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No. _____

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In The

Supreme Court of the United States

PRIMEGUARD INSURANCE COMPANY, INC. (RRG) and 1SOURCEAUTOWARRANTY.COM, INC.,

Petitioners,

v.

JOHN GARAMENDI, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, THE CALIFORNIA DEPARTMENT OF INSURANCE, and JON A. TOMASHOFF,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Does the federal Product Liability Risk Retention Act of 1981, as amended by the Liability Risk Retention Act of 1986, preempt non-domiciliary State laws that "indirectly" regulate the operation of risk retention groups (RRGs) by excluding risk retention group members from doing business in those States premised on the State's disagreement with Congress' policy that financially responsible RRGs and their members should be exempt from State control, provided that the RRGs adequately protect the public against non-performance by a member?

CORPORATE DISCLOSURE STATEMENT

PRIMEGUARD INSURANCE COMPANY, INC. (RRG), is a risk retention group formed pursuant to the Federal Liability Risk Retention Act, 15 U.S.C. § 3901, *et seq*. There is no parent corporation and no publicly held company owns more than ten percent (10%) of its stock.

1SOURCEAUTOWARRANTY.COM, INC. d/b/a 1Source Auto Warranty is a wholly owned subsidiary of First Assured Warranty Corporation. No publicly held company owns more than ten (10%) of its stock.

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Petitioners PrimeGuard Insurance Company, Inc (RRG), ("PrimeGuard"), and 1SOURCEAUTOWARRANTY.COM, Inc, ("1Source") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-titled proceedings on October 22, 2004.

OPINIONS BELOW

1. The August 19, 2002 order of the United States District Court for the Northern District of California denying Petitioners' Motion for Partial Summary Judgment is unreported and reproduced at Appendix 5a.

2. The October 22, 2004 Per Curiam Opinion for the United States Court of Appeals for the Ninth Circuit affirming the District Court was unpublished, is unreported and reproduced at Appendix 1a.

JURISDICTION

A three judge panel of the United States Court of Appeals for the Ninth Circuit entered its ruling affirming the District Court's denial of Petitioners' Motion for Partial Summary Judgment which argued that the federal Liability Risk Retention Act (RRA) of 1986 preempted California's parochial exclusion of PrimeGuard's risk retention group[1] (RRG) member, 1Source. The District Court dismissed as immaterial PrimeGuard's spotless record of performance

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[1] The RRA allows businesses with similar liability risks to form insurance cooperatives called "risk retention groups" ("RRGs"). The RRA was intended to encourage the formation of RRGs by eliminating the multi-state regulation of these entities, vesting primary regulatory authority with the RRGs' domiciliary state and prohibiting non-domiciliary states from directly or indirectly regulating RRGs.

matched by 1Source's impressive record towards its customers.

An interlocutory appeal from the District Court's denial was effectuated under 28 U.S.C. § 1292(b). The United States Court of Appeals for the Ninth Circuit summarily affirmed without oral argument on October 22, 2004. Petitioners filed a Petition for Rehearing or Rehearing En Banc on November 5, 2004. The Ninth Circuit denied that Petition on January 28, 2005. Associate Justice Sandra Day O'Connor granted Petitioners a 30-day extension of time to file a Petition for a writ of certiorari on April 14, 2005. The jurisdiction of this Court to review the interlocutory order of the Court of Appeals affirming the District Court's denial pivoting on the federal Liability Risk Retention Act is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. Article VI of the United States Constitution provides that, "This Constitution, and the Laws of the United States which shall be made in pursuance thereof...shall be the supreme Law of the Land...."

2. 15 U.S.C. § 3902(a)(1) states:

> "[A] risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would...make unlawful, or regulate, directly or indirectly, the operation of a risk retention group except that the jurisdiction in which it is chartered may regulate the formation and operation of such a group...."

STATEMENT OF THE CASE

Petitioner 1Source is a member of co-Petitioner PrimeGuard, a RRG formed under the Liability Risk Retention Act, 15 U.S.C. § 3901, *et seq.*. PrimeGuard has been writing liability insurance for vehicle service agreements (VSAs) issued by its members since April 6, 1998, or more than seven years. [2]

1Source accounts for approximately 70% of PrimeGuard's business, meaning that the latter would be crippled without the former.[3] 1Source markets VSAs directly to automobile owners as the primary obligor.[4] It is a price leader, innovating a new way of selling VSAs by reliance on the Internet marvel that Joseph Schumpeter would have identified as an engine of economic progress, a "process of industrial mutation that incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one."[5] PrimeGuard insures that the VSA promises made by 1Souce to its customers are fully honored. [6]

PrimeGuard is domiciled in Hawaii. Under the RRA, it answers to Hawaii's financial responsibility and

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[2] Declaration of Mark Storrer In Support of Motion for Preliminary Injunction (ER 22-26) (ER denotes references to the joint 9th Circuit extract of the record and page number)

[3] Id.

[4] www.1sourceautowarranty.com

[5] Schumpeter, Joseph, Capitalism, Socialism, and Democracy, pg. 83, (1942).

[6] PrimeGuard insures 1Source's contractual obligations against claims brought by automobile owners if 1Source fails to pay for covered repairs. 1Source is the insured party and the individual automobile owners are the third party beneficiaries of PrimeGuard's policy with 1Source.

sister insurance laws. The Act permits domiciliary as opposed to non-domiciliary States to regulate the formation and operation of RRGs, with specified exceptions. *See* 15 U.S.C. § 3902(a)(1). PrimeGuard's insurance record is spotless. Neither Hawaii nor any other State has questioned its ability to satisfy its VSA insurance obligations to 1Source or its other members, and thus fully protect the public against non-performance in paying for covered auto costs.

PrimeGuard registered in California as a RRG in March 1999 as required by the Act, 15 U.S.C. § 3902(d)(2), despite California's apparent hostility. Research was unable to identify a single RRG that had chosen California as its domiciliary State. In contrast to several other States, California denies captive insurers like PrimeGuard specially tailored regulation consistent with the RRA.[7] Moreover, California has recently saddled RRGs with a 60-day waiting period before doing business. [8] *See* California Insurance Code § 132. The RRA scheme Congress fashioned has not occasioned a "race to the bottom" by States to attract RRGs. For example, PrimeGuard chose Hawaii as its domiciliary State, which features 18 RRGs in aggregate, compared with sister jurisdictions like Vermont and South Carolina, which have attracted substantially more.[9] An A.M.Best insolvency study for the years 1987-2002 revealed a failure rate for licensed property/casualty insurers of 1.0%, virtually identical with the corresponding 1.1% for RRGs.[10]

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[7] The Risk Retention Reporter, May 2005, Volume 19, No. 5, pg. 7.

[8] The regulation seems contradictory to the RRA, 15 U.S.C. § 3902(a)(1)(D), which omits any suggestion of a waiting period.

[9] Insurance Information Institute, May 2005 press release. (http://www.iii.org/media/hottopics/insurance/test3/?table_sort_725540=4&printerfriendly=yes)

[10] The Risk Retention Reporter, October 2003, Vol. 17, No. 10, pg. 5.

The RRA does not embrace a "caveat emptor" philosophy. Congress scrupulously protected consumers. For example, RRGs and their members are accountable to State laws regarding "deceptive, false, or fraudulent acts or practices..." 15 U.S.C. § 3902(a)(1)(G). Congress also protected consumers against financially irresponsible RRGs and non-performance by members. RRGs must comply with non-discriminatory capital requirements of their domiciliary States. Id. at § 3902(a)(1). They must submit to examinations by State insurance commissioners in each State in which they do business. Id. at § 3902(a)(1)(E). A State insurance commissioner may obtain a federal court injunction against an RRG upon a finding that "such group is in hazardous financial condition." Id. at § 3906. And an RRG must comply with a lawful order in a delinquency proceeding commenced by the State insurance commissioner if there has been a finding of "financial impairment." Id. at § 3902(a)(1)(E) and (F).

California has never questioned PrimeGuard's financial condition, tacitly conceding that 1Source's California customers would be fully protected in the event 1Source defaulted on its VSA obligations.

California law uniquely treats VSAs as "automobile insurance," not as a service contract as is customary in all other sister jurisdictions. *See* California Insurance Code § 116(b). Accordingly, California requires issuers of VSAs like 1Source to qualify as authorized insurance companies on the same terms and conditions as industry giants such as Allstate, State Farm or Nationwide before they may advertise, sell, service, or adjust its auto warranty claims in the State. California apparently believes that only conventional insurance companies feature the capital and surplus necessary to protect consumers against non-performance, notwithstanding the RRA.

The California Department of Insurance formed a special squad to target Internet issuers of VSAs, including 1Source.[11] In contrast, California automobile dealers selling VSAs are not actively policed by the Department of Insurance. [12]

On or about August 29, 2001, the then Commissioner of Insurance, and predecessor to Respondent Garamendi[13], Harry Low, indirectly hobbled PrimeGuard's operations by issuing a Cease and Desist Order against 1Source's marketing of VSAs to California consumers. *See* Appendix 41a. In accord with California law, a subsequent hearing was held by an Administrative Law Judge (ALJ). The ALJ's recommendation to affirm the Cease and Desist Order on the theory that 1Source was selling automobile insurance in California without a certificate of authority to do so under § 116(b) of the California Insurance Code was accepted by the Commissioner of Insurance on March 21, 2002. *See* Appendix 46a. The Cease and Desist proceedings were initiated without any public complaints. [14] (Indeed, 1Source was saving its customers 20-50% off customary VSC rates[15]). The Denver Better Business Bureau reports a nationwide complaint rate against 1Source of three-tenths of one percent (0.3%).[16] Neither did California find that 1Source's

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[11] Transcript, Cross-Examination of Jon Tomashoff at California Department of Insurance hearing, December 7, 2001 (ER 54)

[12] Id.

[13] John Garamendi replaced Harry Low as Commissioner on January 6, 2003.

[14] One grievance against 1Source was later filed. *See* Defendants' Responses to the First Set of Requests for Documents.

[15] Transcript of May 9, 2002 hearing, page 20

[16] http://www.denverbbb.org/custom/search.cfm

marketing of VSAs was misleading, false, or deceptive in any way.

Before the ALJ's decision, Petitioners on February 12, 2002 filed suit in the United States District Court for the Northern District of California seeking a declaration, *inter alia*, that the Cease and Desist Order was preempted by the RRA. An injunction against enforcement of the Order was also requested. Constitutional equal protection and commerce clause claims supplemented the federal preemption argument. *See* Appendix 59a.

The District Court denied Petitioners' Motion for Partial Summary Judgment on the preemption claim. It reasoned that the RRA did not preempt application of California's insurance laws to 1Source, a PrimeGuard member. According to the District Court, a non-domiciliary State is unrestricted in regulating the business dealings of a RRG member with the public even if its practical impact indirectly impairs the RRGs operations. *See* Appendix 5a.

The District Court certified the federal preemption issue for interlocutory review under 28 U.S.C. § 1292(b) because, "It appears that no other court in the circuit, the 9th Circuit, has previously addressed [Petitioners'] position or that a similar-or the similar issue on point." *See* Appendix 4a.

The United States Court of Appeals accepted the certification and summarily affirmed without oral argument. It categorically declared that, "The Risk Retention Act does not exempt from regulation members of risk retention groups; rather, it exempts risk retention groups themselves." *See* Appendix 2a. In other words, the RRA placed absolutely no limits on State regulation of RRG members.

A petition for rehearing or rehearing en banc was denied. *See* Appendix, 24a.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit violated this Court's "plain meaning" canon of statutory instruction in denying that State rules or orders crippling RRG members could effectuate an "indirect" regulation of the operation of a RRG[17]

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[17] The interlocutory nature of the decision below should not deter this Court from granting the petition. Interlocutory orders that either conflict with existing precedent or "produce immediate consequences" have been regularly reviewed. Mazurek v. Armstrong, 520 U.S. 968, 975 (1997). This Court has found it appropriate to review interlocutory rulings that are "fundamental to the further conduct of the case". *See e.g.* Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 685 n.3 (1949)(reviewing jurisdictional issue); Land v. Dollar, 330 U.S. 731, 734 (1947); U.S. v. General Motors Corp., 323 U.S. 373, 377 (1945)(reviewing interlocutory ruling that construed statutory language applicable to further proceedings); *see also* Michael v. U.S., 454 U.S. 950, 951 (1981)(White, J. dissenting from denial of certiorari)("[w]here there is an important and clean cut issue of law that is fundamental to the future conduct of the case and that otherwise would qualify as a basis for certiorari, interlocutory status need not preclude review.")

In this case, the Ninth Circuit's ruling that the RRA does not preempt indirect state regulation of the operation of RRGs by evicting their members dramatically impacts the further conduct of the case. A reversal of the Ninth Circuit's ruling would avoid the need to decide pending constitutional issues under the Commerce and Equal Protection clauses. Under these circumstances, it is appropriate for this Court to review the interlocutory decision addressing an important question of federal preemption. *See* Pharmaceutical Research and Manufacturers of America v. Walsh, 538 U.S. 644 (2003)(reviewing preliminary injunction to determine if lower court correctly decided issue of preemption under federal Medicaid law).

The order below also clearly produces "immediate consequences" for Petitioners and all other members of liability risk retention groups. Mazurek, 520 U.S. at 975. If the Cease and Desist Order entered remains in force, states may effectively destroy RRGs by

The Ninth Circuit held that neither PrimeGuard nor 1Source enjoyed protection under the RRA against California's eviction of 1Source because federal preemption does not reach RRG members, but only RRGs themselves: "The Risk Retention Act does not exempt from regulation members of risk retention groups; rather, it exempts risk retention groups themselves." *See* Appendix 2a. The Ninth Circuit ignored the plain meaning of the RRA, contrary to American Tobacco v. Patterson, 456 U.S. 63, 68 (1982), and Connecticut National Bank v. Germain, 503 U.S. 249, 253-254 (1992).

The Act prohibits non-domiciliary States from "indirectly" regulating the operations of RRGs. The ordinary meaning of "indirect" is "resulting otherwise than directly, as effects or consequences." *Wordnet 2.0* (2003). Accordingly, the operations of a RRG may be "indirectly" regulated or thwarted by State decrees that prohibit its members from doing business in those jurisdictions in violation of the RRA. The Ninth Circuit, however, turned the word "indirectly" into an ink blot as applied to State attacks on RRG members, contrary to the clear meaning of Congress.

In this case, California's order excluding 1Source from its VSA market indirectly withered the operations of PrimeGuard in the State by erecting a Chinese wall against its Ursa Major member. The barrier aimed at the RRG

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arbitrarily prohibiting their members from operating within their borders. In addition, nothing can be gained by requiring further proceedings before review is granted on a pure issue of preemption law. *See* Gillespie v. US Steel Corp., 379 U.S. 148, 153 (1964)(review of interlocutory order granted where "the costs... will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided"). Rather, this is a case where "the right of appeal is of very little value to [the petitioner if] he may be ruined before he is permitted to avail himself of the right." Forgay v. Conrad, 47 U.S. (6 How.) 201, 205 (1848).

member was thus preempted under § 3902(a)(1). That conclusion is fortified by the unambiguous intent of Congress that preemption was to be muscular, not effete for RRGs: "[t]he authority of non-domiciliary states to license and regulate risk retention groups is largely preempted." State of Fla. v. Nat'l Amusement Purchasing Group, Inc., 905 F.2d 361, 363 (11th Cir. 1990).[18] Every court that has addressed the issue has stressed the breadth of RRA preemption. *See* Swanco Insurance Co. v. Hager, 879 F.2d 353, 357 (8th Cir. 1989), *cert. denied*, 493 U.S. 1057 (1990)("The authority of non-domiciliary states is largely preempted."); State of Florida Department of Insurance v. Nat'l Amusement Purchasing Group, 905 F.2d 361, 363 (11th Cir. 1990)(characterizing the Act as containing "sweeping preemption language"); City Cab Co. v. Edwards, 745 F. Supp. 757, 761 (D.Me. 1990)("The express preemption of state law with respect to risk retention groups is expansive..."); Nat'l Home Insurance Co. v. State Corporation Commission of the Commonwealth of Virginia, 838 F. Supp. 1104, 1109 (E.D.Va. 1993)("The preemptive thrust of the Risk Retention Act is pellucidly clear."); Garage Services and Equipment Dealers Liability Assoc. of America v. Homes, 867 F. Supp. 1301, 1304 (E.D.Ky. 1994)(remarking that the Act "broadly preempts" the states from regulating directly or indirectly the operation of a risk retention group).

The United States Court of Appeals for the Second Circuit, in contrast to the Ninth Circuit, sensibly gave independent meaning to the word "indirectly" in Preferred Physicians Mutual Risk Retention Group v. Pataki, 85 F.3d 913 (2nd Cir. 1996). In that case, New York encouraged

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[18] Unlike the provision in this case, the preemption provision relating to purchasing groups "took the opposite approach and avoided sweeping preemption language in favor of designated specific categories of state law to be preempted." The Insurance Co. of the State of Pa. v. Corcoran, 850 F.2d 88, 91 (2nd Cir. 1988); *see also* 15 U.S.C. § 3903.

medical practitioners to boycott RRGs by offering a free layer of excess insurance coverage only if their primary coverage was with a New York licensed insurer. The Second Circuit concluded that seeking to manipulate the insurance choices of practitioners against RRGs would constitute illegal indirect State regulation of the groups themselves if the manipulation substantially compromised their ability to compete with the favored in-state insurers. Id. at 917. That conclusion obtained even though the direct targets of New York's manipulation were not RRGs themselves. The Ninth Circuit's ruling would have automatically exonerated New York because its excess insurance law focused on RRG members.

The Ninth Circuit's interpretation makes a mockery of the RRA. Congress concluded that where, as here, a financially responsible RRG guaranteed performance of the obligations of its members to the public, non-domiciliary States were preempted from imposing additional requirements on those members to further insure that the obligations would be honored. The latter constitutes an "indirect" State regulation of the operation of the RRG itself by shrinking or evicting its membership group. By analogy, a State would be indirectly regulating wine producers by circumscribing eligible buyers. *See* Granholm v. Heald, 2005 WL 1130571 (May 16, 2005).

Certiorari is warranted to provide an authoritative interpretation of "indirect" State regulation of the operations of RRGs prohibited by the RRA under 15 U.S.C. § 3902(a)(1), especially because the economic ramifications of the issue are great and implacable State hostility towards preemption continues to generate dispute and litigation.

2. The Ninth Circuit decided an important question of federal preemption under the Risk Retention Act in a way that threatens the viability of risk retention groups by inviting crippling attacks on RRG members by state insurance commissioners tirelessly devoted to defending and expanding their regulatory turf

A. Risk Retention Groups Are Economically Significant

As of April 2005, 192 RRGs were operating in the United States, a jump of 10 from 182 in November 2004.[19] Premiums written by RRGs are projected to climb to $2.16 billion in 2004, an increase of 24.1% from $1.7 billion in 2003.[20] By 2001, the number of RRG insured members had soared to 174,000.[21] These figures understate the economic impact of the RRA. Competition in the business liability insurance sector is enhanced by the prospect that dissatisfied customers will form RRGs. In sum, the Ninth Circuit's decision leaving RRG members defenseless against hostile State regulation may confound the operations of the financially impressive RRG industry and thwart competition and consumer welfare, contrary to the intent of Congress.

B. State Insurance Commissioners Are Implacably Hostile to the RRA, RRGs, and their Members

From the birth of the idea of the RRA, state insurance commissioners have fiercely resisted congressional encroachment on their traditional bureaucratic turf

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[19] www.rrr.com/news

[20] The Risk Retention Reporter, October 2004, Volume 18, No. 10, pg. 1.

[21] www.rrr.com/education/growth.cfm

conferred by the McCarran-Ferguson Act (15 U.S.C. § 1011, *et seq.*). They have denied that the RRA was needed to promote affordability and availability of business liability insurance. They have insisted, contrary to demonstrable fact, that RRGs would be financially risky propositions dangerous to the public. They have given a cramped construction to the RRA, campaigned against its enlargement, and unleashed lawsuits against RRGs or their members. In sum, State insurance commissioners have rebelled against the congressional conclusion, enshrined by the RRA and substantiated by experience, that RRGs and their members need federal preemption to reduce liability insurance costs and expand liability insurance availability, both achievable without jeopardizing customary consumer safeguards against insolvency or fraud. The following chronicle speaks volumes.

During a 1977 congressional hearing, Mr. Lester Rawls, President of the National Association of Insurance Commissioners, testified that federal legislation would be gratuitous:

> The NAIC does not believe that the federal government should become involved with insurance availability plans in the products liability field at this time for at least two basic reasons. First, as the Federal Interagency Task Force on Product Liability noted in its "Briefing Report" earlier this year, the "unavailability" situation in the products liability insurance market is not so serious as to justify a federal reinsurance program like that contemplated in the bills enumerated above. Secondly, the NAIC believes that existing and proposed local industry placement committees are best-suited to handling whatever availability problems

> exist on the state level. Unless existing market conditions drastically change to undercut these two considerations, there is no justification for injecting a new massive and costly federal venture which is not aptly designed to solving the real problem.[22]

During a 1978 hearing, Wesley J. Kinder, the Insurance Commissioner of California and the Vice President and Chairman of the Executive Committee of NAIC co-authored a statement also insisting that federal legislation was unnecessary to override state regulatory burdens on risk retention groups:

> Another false premise underlying the PLRAA is the notion that "[s]tate insurance laws contain barriers to the formation of risk retention groups which are inappropriate and which, as a practical matter, preclude their formation." After examining the examples of state "regulatory burdens" cited by the Department of Commerce the NAIC cannot agree that state laws are serious impediments to the formation of product liability reciprocals, or "risk retention groups."[23]

NAIC adopted the following resolutions during its June 1979 meeting:

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[22] U.S. House of Representatives, Committee on Small Business, Subcommittee on Capital, Investment and Business Opportunities, Hearing on Product Liability Insurance, 95th Cong., 1st Sess., 1977 at 863 (emphasis added); see also p. 851.

[23] U.S. House of Representatives, Subcommittee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce, Hearing on Product Liability: Legislative Hearings, 96th Cong., 1st Sess., 1978 at 1006-1007.

> THEREFORE BE IT RESOLVED, that the NAIC opposes any proposal which places regulatory supervision over "risk retention groups" in the hands of the federal government, and
>
> BE IT FURTHER RESOLVED, that the NAIC opposes the "Product Liability Risk Retention Act of 1979" as explained by the U.S. Department of Commerce as an unwarranted and inadequate substitute for state regulation of product liability insurance[.][24]

Congress found the parochial and alarmist views of state insurance commissioners unpersuasive. It enacted the RRA in 1981, but confined it to product liability insurance. Congress anticipated State hostility, and thus fashioned a broad preemption provision. *See* 15 U.S.C. § 3902(a)(1). The House Report elaborated:

> In the last Congress, the Committee's Subcommittee on Consumer Protection and Finance held nine days of hearings on the products liability problem, three days of which were devoted exclusively to examining the nature and causes of the problem ... The Product Liability Risk Retention Act of 1981 evolved out of these hearings.
>
> * * * * * * *

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[24] U.S. House of Representatives, Subcommittee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce, Hearing on Product Liability: Legislative Hearings, 96th Cong., 1st Sess., 1978 at 1005-1006 (emphasis added).

> The overwhelming majority of the witnesses, who appeared before the subcommittees, agreed that the rising costs of product liability insurance in the form of increased premium and higher deductibles, continue to place a severe economic burden upon product sellers, particularly small businesses.
>
> * * * * * * *
>
> *Federal action is necessary because experience has shown that individual state legislation cannot facilitate the formation of self-insurance groups. Individual states can only enact legislation affecting their respective insurance law requirements. The practical effect of these laws is to prevent product sellers located in several states from forming such groups.*
>
> * * * * * * *
>
> In product liability, because of the geographical dispersion of firms with similar risk interests, it is inevitable that more than one state jurisdiction becomes involved in insurance-oriented solutions. *Therefore, federal action must be taken.* [emphasis added][25]

The resentment of State commissioners over the RRA found expression in a Model Risk Retention Act drafted by the NAIC to circumscribe its application by a crabbed definition of "product liability." Accordingly, Congress amended the RRA in 1983 to clarify the meaning of the term and foil the State mischief. The accompanying Senate Report

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[25] H.R. Report No. 190, 97th Cong., 1st Sess.1433 - 1435 (1981), *reprinted in* 1981 USCCAN 1432 (emphasis added)("This preemption is central to the act's objective ....").

sharply warned States to accept the supremacy of federal law as written, and to eschew massive resistance:

> Following the enactment of the Risk Retention Act, the National Association of Insurance Commissioners (NAIC) proposed the adoption of a model State act to assist the States in implementing the Federal act. While this model bill may be a helpful piece of legislation on the whole, it departs from the language of the Risk Retention Act in a critical area and adopts a definition of "products liability" that restricts the scope of the Act.
>
> * * * * * * *
>
> The Committee appreciates the concern of some State insurance regulators that the Risk Retention Act not be used as a vehicle to avoid legitimate State regulation .... *However, insurance regulators should not construe the law in a way that defeats the full purpose and objective of the Risk Retention Act.*[26]

Experience under the RRA proved rewarding. Accordingly, Congress expanded the law in 1986 to enable any business or any state or local government to obtain any type of business liability insurance from RRGs, and maintained the RRA's broad preemption hammer. The House Report amplified:

> The 1981 Act was premised on an 18-month study by the Federal Interagency Task Force on Product Liability. It was believed that the

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[26] Senate Report No. 172, 98th Cong., 1st Sess.2077 (1983), *reprinted in* 1983 USCCAN 2075 (emphasis added).

> proposed risk retention legislation would help deal with the fact that many rates appear to be based not on actuarial techniques, but on subjective underwriting judgments ..... It was also believed that the 1981 Act, by providing alternative[s] to traditional insurance, would promote greater competition among insurers to "encourage private insurers to set rates to reflect experience as accurately as possible." House Report 97-190 page 4.
>
> * * * * * * *
>
> *The Committee believes that these considerations remain valid and justify expansion of the scope of the 1981 Act to include other lines of liability insurance, as set forth in the current bill.*
>
> * * * * * * *
>
> In addition to noting the Committee's belief that the current bill is needed because it can help address the problems discussed above, it should be noted that the particular form of this legislation is required because of certain aspects of State law. *Some states have created capital and other requirements that make it difficult for risk retention groups to form or to operate on a multi-state basis.... It is necessary to exempt risk retention and purchasing groups from State law, in the respects specified in the Risk Retention Act, in order to achieve the beneficial effects of such groups referred to above.* [emphasis added][27]

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[27] H.R. No. 865, 99th Cong., 2nd Sess. 5304-5306 (1986), *reprinted in*, 1986 USCCAN 5303.

Congress recognized, however, that it was entering uncharted waters. It thus instructed the Secretary of Commerce to evaluate implementation of the RRA, including the regulatory structure and preemption provisions, and promised amendments would be forthcoming to cure any defects.

> ....Section 10 of the 1986 Amendments provides for an evaluation by the Secretary of Commerce, including an evaluation of the regulatory structure and preemption established by the Act and a report upon its adequacy. The Committee is reporting this bill [sic] that it creates a workable legal framework. At the same time, the novelty and complexity of implementation of this legislation require extra vigor in the exercise of the Committee's responsibility to follow up with oversight of implementation. The Committee believes that the current legislation is sound, but the Committee will not hesitate to return to the subject if the results are unsatisfactory.[28]

In response to comments invited by the Department of Commerce on March 17, 1987, state insurance commissioners uniformly assailed the RRA and its preemptive effect on state solvency standards and otherwise. The following submissions confirm their implacable hostility to the federal law:

> The NAIC remains extremely concerned about the ability of states to ensure financial integrity and to enforce various provisions of the RRA 1986. In addition, certain provisions

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[28] H.R. No. 865, 99th Cong., 2nd Sess. 5318 (1986), *reprinted in*, 1986 USCCAN 5303.

of the federal act are imprecise, but experience and future court interpretation may be the only feasible manner to clarify legal standards. [29]

...

Still another fundamental concern is that, by enacting RRA, Congress preempted not only insensitive state inaction and irresponsible state action, but also undermined and undercut thoughtful and responsible state action - including state action in New York and elsewhere that, we think, will prove more efficient in resolving the very availability and affordability problems that understandably concern Congress. [30]

...

Congress has done an effective job of preemption, but has established an ill-conceived scheme of regulation, where residual state regulatory abilities are hampered or cosmetic in nature, leaving a regulatory void that is not in the public interest.[31]

...

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[29] *Liability Risk Retention Act of 1986: Implementation Report of 1987,* Appendix E-1 at 5.

[30] *Id.* at Appendix E-7 at 9 (New York Superintendent of Insurance).

[31] *Id.,* (Exhibit A at 4)

> In our view, the regulatory structure established by the Act is unsatisfactory in that it preempts a state's ability to set rigorous solvency safeguards.[32]
>
> ...
>
> Clearly the intent of Congress in this regard needs to be more clearly delineated to avoid (1) allowing many insurance companies to escape otherwise applicable state regulations or (2) having certain insurance companies subjected to state requirements not intended by Congress.[33]

These angry views were reiterated by NAIC in comments on the RRA offered to the Department of Commerce in 1989:

> The structure of the Act must be judged by how uniformly and effectively it is applied without the necessity of court interpretation. The Act's lack of definition and specificity has created regulatory voids which the states have attempted to fill....
>
> * * * * * * *
>
> The "onerous" state rules allegedly preempted by the Risk Retention Act are rules that have been found necessary in the past one hundred and fifty (150) years of insurance regulation. The Act has resulted in a hazardous regulatory void that will

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[32] *Id.* at Appendix E-8 at 4 (New Jersey Commissioner of Insurance).

[33] *Id.* at Appendix E-10 (Kansas Commissioner of Insurance).

> ultimately prove detrimental by certain entities taking advantage of this uncertainty.[34]

NAIC remains adamantly opposed to the expansion of RRGs and further loss of their regulatory turf. As a Congressional Research Service Report for Congress recounted:

> At the September 2003 meeting, the NAIC was encouraged to adopt a draft resolution that would put the group on record as opposing the expansion of risk retention groups. Among the reasons cited in the resolution was the danger to consumers from a limitation on states' regulatory authority, the example of the National Warranty failure[35], and the absence of an availability problem in property insurance that has not been addressed by state-based solutions. No resolution has been adopted, but a working group to examine issues surrounding risk retention groups was created and it met at the December 2003 NAIC meeting.[36]

State insurance commissioners have exploited alleged ambiguities in the RRA to sue RRGs or their

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[34] *Liability Risk Retention Act of 1986: Implementation Operations of 1989*, Appendix E-4 at 3.

[35] The National Warranty reference misleads more than informs. The RRG was domiciled in the Cayman Islands, not in the United States. It was grandfathered as a RRG under the RRA despite its foreign domicile before 1985. *See* 15 U.S.C. § 3901(a)(4)(C)(ii). No company has been permitted to initiate operations as a RRG under the federal law like National Warranty for more than two decades.

[36] Baird Webel: *The Risk Retention Acts: Background and Issues*, CRS Report for Congress, January 12, 2004.

members and to deny preemption. Lower federal courts have repeatedly confronted the preemption question. *See* pages 8-9, *supra*.. This Court has declined previous opportunities to provide definitive interpretive standards. *See* Dillon v. Combs, 895 F.2d 1175 (7th Cir. (Ind.) 1990), *cert. denied,* 498 US 1023 (1991)(federal jurisdiction issue); Home Warranty Corp. v. Caldwell, 777 F.2d 1455 (11th Cir. (Ga.) 1985), *cert. denied,* 479 US 852 (1986)(preemption issue); Hudson Insurance Company v. American Electric Corporation, 748 F. Supp. 837 (M.D.Fla. 1990), *aff'd,* 957 F.2d 826 (11th Cir. 1992), *cert. denied,* 506 US 955 (1992)(federal jurisdiction issue); Mears Transportation Group v. State of Florida, 34 F.3d 1013 (11th Cir. (Fla.) 1994), *cert. denied,* 514 US 1109 (1995)(preemption issue); National Home Insurance Company v. Commonwealth of Virginia, 444 S.E.2d 711 (Va. 1994), *cert. denied,* 513 US 1083 (1995)(court of competent jurisdiction issue); National Warranty Insurance Company v. Greenfield, 24 F. Supp. 2d 1096 (D.Or. 1998), *aff'd,* 214 F.3d 1073 (9th Cir. 2000), *cert. denied,* 531 US 1104 (2001)(preemption issue); Swanco Insurance Co.-Arizona v. Hager, 879 F.2d 353 (8th Cir. 1989), *cert. denied,* 493 U.S. 1057 (1990)(preemption issue). That omission has enabled State insurance commissioners to shackle a federal law to which they have never been reconciled by repeated legal attacks on RRGs and their members. The ruling of the Ninth Circuit aggravates the problem by categorically denying RRGs protection against indirect state regulation of their operations effectuated by legal assaults on their members. [37]

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[37] California is special problem because its Insurance Commissioner is popularly elected, and thus attracts the politically ambitious. *See* California Insurance Code § 12900(a) and (b). The incumbent briefly ran for governor in 2003.

C. *Congress has rejected as unsound the reasons state insurance commissioners proffer for regulating RRGs through their members*

Congress created threefold safeguards against financially irresponsible RRGs in the RRA. First, a RRG must comply with the capital and surplus requirements of its domiciliary State. *See* 15 U.S.C. § 3902(a)(1). Second, a non-domiciliary State is empowered to obtain a federal court injunction against a RRG in financially hazardous condition. *See* 15 U.S.C. § 3906. Third, a non-domiciliary State may issue an order against a RRG in a delinquency proceeding if there has been a finding of financial impairment. *See* 15 U.S.C. § 3902(a)(1)(F). The latter two powers have seemingly remained dormant (with no reported case law), indicating that domiciliary jurisdictions over RRGs are demanding adequate financial thresholds.

These threefold federal protections against RRG insolvencies have proven thoroughly satisfactory. As previously stated, an A.M. Best insolvency study for the years 1987-2002 showed the rate for property/casualty carriers approximated 1.0%, virtually identical with the corresponding 1.1% figure for RRGs. In sum, the tired refrain of state insurance commissioners that RRGs should be handcuffed because their escape from non-domiciliary States' insurance floors makes them financially unsound is counterfactual. In any event, Congress repudiated that hypothesis in the RRA, and deplored multiple State capital and other requirements. To reiterate a portion of House Report 865:

> "Some states have created capital and other requirements that make it difficult for risk retention groups to form or to operate on a multi-state basis.... It is necessary to exempt risk retention and purchasing groups from State law, in the respects specified in the Risk

> Retention Act, in order to achieve the beneficial effects of such groups referred to above."[38]

The Ninth Circuit's decision permits States to shrivel the RRG industry that Congress aimed to nurture and flourish by second-guessing the RRA's financial responsibility safeguards. California was authorized to shut down 1Source, the centerpiece of PrimeGuard's operations, based on California's fear that 1Source's VSA customers would be inadequately protected against non-performance unless 1Source qualified as a California insurance company, including capital and surplus requirements. Congress, on the other hand, concluded that 1Source's customers would be adequately protected by a financially sound RRG, PrimeGuard, ready, willing, and able to honor all of the contractual VSA obligations of its members.

Certiorari is warranted in this case to halt the relentless assault by State insurance commissioners against the operations of RRGs through their members. The Ninth Circuit wrongly insisted that Congress intended only State laws directly targeting RRGs to be preempted, and thus erased the term "indirect" from the law in defiance of congressional intent.

CONCLUSION

For these various reasons, the petition for certiorari should be granted.

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[38] H.R. No. 865, 99th Cong., 2nd Sess. 5304-5306 (1986), *reprinted in*, 1986 USCCAN 5303.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PRIMEGUARD INSURANCE COMPANY, INC., (RRG), and 1SOURCEAUTOWARRANTY.COM, INC, Plaintiff- Appellant, v. HARRY W. LOW, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, THE CALIFORNIA DEPARTMENT OF INSURANCE, AND JON A. TOMASHOFF, Defendant - Appellee.	No. 03-17196 D.C. No. CV-02-00748-JSW MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Submitted September 17, 2004**
San Francisco, California

[ENTERED: September 17, 2004]

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Before: OAKES,*** KLEINFELD, and CALLAHAN Circuit Judges.

Appellate jurisdiction exists because appellants' notice of appeal was timely filed. *See* Fed. R. App. P. 4(a)(2); *Radio TV Espanola S.A. v. New World Entm't Ltd,* 183 F.3d 922, 932 & n.12 (9th Cir. 1999).

We affirm the district court's ruling that the federal Liability Risk Retention Act (15 U.S.C. § 3901 et seq.) does not preclude California from issuing a cease and desist order instructing appellant 1SourceAutoWarranty.com, a member of a risk retention group, to stop marketing vehicle service agreements to consumers in California. The Risk Retention Act does not exempt from regulation members of risk retention groups; rather, it exempts risk retention groups themselves.

The exemptions contemplated by the Risk Retention Act were premised on "the limited field of customers that [risk retention] groups could serve." *Home Warranty Corp,* v. *Caldwell,* 111 F.2d 1455, 1468 (11th Cir. 1985), Since risk retention groups are "member servicing organizations only," the interest of non-domiciliary states to regulate "insurers dealing with the public was to remain untouched by [the Risk Retention Act]." *Id* Taken as a whole, 15 U.S.C. § 3902 precludes non-domiciliary state laws that attempt to regulate insurance coverage provided by a risk retention group to its members. It does not, however, exempt insurance sold by a member of a risk retention group to consumers. *See* 15 U.S.C. § 3902(f)(i) ("[N]othing in this chapter shall be construed to affect the authority of any State to make use of any of its powers to enforce the laws of such State with respect to which a risk retention group is not exempt under this chapter.") None of the authorities and

*** The Honorable James L. Oakes, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

nothing in the legislative history cited by appellants contradicts this construction. The district court's ruling is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PRIMEGUARD INSURANCE COMPANY, LTD.; 1SOURCEAUTOWARRANTY.COM,

Plaintiffs,

v.

HARRY W. LOW, Insurance Commissioner of the State of California; CALIFORNIA DEPARTMENT OF INSURANCE; JON A. TOMASHOFF,

Defendants.

_____/

No. C 02-748 JSW

ORDER CERTIFYING AUGUST 19, 2002 ORDER FOR INTERLOCUTORY APPEAL

[ENTERED: September 2, 2003]

For the reasons stated on the record during the hearing before the Court on August 1, 2003, Plaintiffs' Request for Certification is GRANTED and the Court's August 19, 2002 Order IS HEREBY certified for interlocutory appeal. Pursuant to 28 U.S.C. § 1292(b), the parties shall file an application for appeal within ten (10) days of this Order.

Pending the Ninth Circuit's consideration of the appeal, proceedings in this action are STAYED.

IT IS SO ORDERED.

Dated: September 2, 2003

/s/ Jeffrey S. White
JEFFREY S. WHITE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PRIMEGUARD INSURANCE CO and
1SOURCEWARRANTY.COM, INC,

Plaintiffs, No C-02-0748 VRW

v. ORDER

HARRY W LOW, California
Insurance Commissioner, the
CALIFORNIA DEPARTMENT OF
INSURANCE and JON A TOMASHOFF,

Defendants.
_____/

[ENTERED: August 19, 2002]

Defendants have moved for judgment on the pleadings (Doc #31), which, pursuant to this court's June 25, 2002, order (Doc #37) and for the reasons discussed below, will be treated as both a motion for partial summary judgment against plaintiffs on their claim under the Risk Retention Act and for judgment on the pleadings against plaintiffs' constitutional claims. Plaintiffs move to file an amended complaint, seeking to add relevant facts occurring subsequent to the filing of this lawsuit. Doc #28. Plaintiffs also move for partial summary judgment. Doc #36.

I

The following facts are undisputed. Plaintiff 1Source, dba 1SourceAutoWarranty.com, is a Colorado corporation that sells extended vehicle service contracts over the internet. Since April 1999, 1Source has been a member of

plaintiff PrimeGuard Insurance Company, Inc (PrimeGuard), a risk retention group (RRG) formed under the Product Liability Risk Retention Act of 1981 (PLRRA), as amended by the Liability Risk Retention Act of 1986 (LRRA), 15 USC §§ 3901-3906 (collectively. Risk Retention Act).

On August 29, 2001, defendant Harry Low, commissioner of the California department of insurance (CDOI), issued to 1Source an order to cease and desist and notice of right of hearing, notice of defense, statement to respondent, request for discovery and declaration of service. Pastierb Decl (Doc #3 6, Exh #1, Att #1). This order was issued as a result of Low's determination that 1Source was in violation of California Insurance Code § 116(d). See id. Section 116(d) provides that:

> A contract covering only defects in material and workmanship * * * where the contract is sold by an automobile dealer incidental to the automobile dealer's business of selling or leasing of automobiles and the legal obligor is other than the automobile dealer shall not be deemed insurance, provided that the legal obligor of the contract complies with [certain] requirements.

The CDOI believes that 1Source is not complying with the requirements of § 116 and is, therefore, transacting insurance in California without a license. In particular, the CDOI contends that 1Source was selling automobile service contracts directly to California consumers over the internet and since this sale was not "incidental" to an automobile dealer's sale of automobiles, 1Source was required to obtain a certificate of authority to act as an insurance company in California, which it had not done. As a result, the CDOI's order directed 1Source to cease and desist immediately from

marketing vehicle service contracts to California consumers by the internet, telephone or mail. The order made no reference to PrimeGuard, which provides liability insurance to its members to insure the liability risks of selling vehicle service agreements. No action has been taken directly against PrimeGuard; rather PrimeGuard is a party in this matter solely because 1Source is one of its members.

On September 10, 2001, 1Source requested a hearing date on the cease and desist order. Morgan Decl (Doc #31, Exh #2). The CDOI set the hearing date for December 10, 2001. On December 10, the hearing was held before administrative law judge (ALJ) Stewart Judson. Defendant Tomashoff, senior staff counsel for the CDOI, was defendants' primary witness at the hearing.

On March 11, 2002, ALJ Judson issued a proposed decision, rejecting many of the arguments advanced by plaintiffs herein and concluding that 1Source was indeed engaging in the sale of insurance to California consumers without a certificate of authority. See Morgan Decl (Doc #31, Exh #7) at ¶ 4. ALJ Judson rejected 1Source's claim that it was exempt from regulation by the CDOI by virtue of being a member of PrimeGuard and that the CDOI's actions were barred by the Commerce Clause. See id at ¶ 5. On March 21, the CDOI adopted ALJ Judson's proposed decision. See id.

Plaintiffs filed suit on February 12, 2002, asserting that the cease and desist order issued by the CDOI violated federal law and seeking declaratory and injunctive relief, enjoining enforcement of the cease and desist order. Doc #1. On February 20, 2002, plaintiffs moved for a preliminary injunction. Doc #4. On May 9, 2002, the court, in essence, denied the preliminary injunction motion without prejudice, determining that the issues had not yet been sufficiently

developed to enable the court to make a preliminary injunction determination. See Tr (Doc #29) at 46:3-6.

Defendants subsequently moved for judgment on the pleadings, pursuant to FRCP 12(c), raising arguments under FRCP 12(b)(1) and (6). Because defendants submitted evidence beyond the pleadings, the court determined that defendants' motion should be treated as one for summary judgment. See 6/25/02 Order (Doc #37). Plaintiffs move for summary judgment on their claim under the Risk Retention Act, which is the primary claim presently at issue. Plaintiffs also seek to amend their complaint.

In reviewing a summary judgment motion, the court must determine whether genuine issues of material fact exist, resolving any doubt in favor of the party opposing the motion. The burden of establishing that there is no genuine issue of material fact lies with the moving party. Celotex Corp v Catrett, 477 US 317, 322-23 (1986). If the nonmoving party would bear the burden of proof at trial, the moving party may meet its burden by pointing out—not by a conclusory statement but by demonstration—the absence of evidence to support the nonmoving party's case. Id at 325-26. Summary judgment is granted only if the moving party is entitled to judgment as a matter of law. FRCP 56(c).

II

Plaintiffs' central claim is that the Risk Retention Act renders the cease and desist order unenforceable, because, by virtue of being a member of a RRG (PrimeGuard), 1Source is exempt from regulation by California. Since Primeguard is domiciled in Hawaii, plaintiffs contend that 1Source is subject only to the laws of Hawaii, pursuant to 15 USC § 3902(a)(1). Plaintiffs, in other words, assert that the preemptive effect of the Risk Retention Act is quite expansive. Simply by being a member of a RRG, plaintiffs

contend that the laws of any non-domicile state that would otherwise apply to 1Source's actions are preempted by federal law. This claim poses a discrete question of law, namely: Is a company that is a member of a RRG exempt from the laws of all states that would otherwise apply to its business practices, except the laws of the RRG's domicile state?

Notwithstanding some potentially confusing language in the Risk Retention Act, the court concludes that this question must be answered in the negative.

"In response to escalating product liability insurance premiums in the late 1970s and early 1980s, manufacturers began to bypass conventional insurance companies and to obtain product liability insurance from insurance cooperatives known as RRGs." National Warranty Ins Co RRG v Greenfield, 214 F3d 1073, 1075 (9th Cir 2000). "Congress enacted the PLRRA in 1981 to encourage the formation and growth of RRGs by reducing state regulation of RRGS, see Hears Transp Group v State of Florida, 34 F3d 1013, 1016-17 (11th Cir 1994), thereby reducing the expenses of RRGs and the cost of insurance to RRG members." Id.

Under the McCarran-Ferguson Act, 15 USC § 1012, the insurance business is primarily regulated by the individual states. The PLRRA permitted RRGs to provide product liability insurance in all states, free of state insurance regulation, as long as RRGs comply with the insurance laws of the state it chooses as its chartering jurisdiction. 15 USC § 3901(a)(4)(C)(i).

In 1986, Congress expanded the PLRRA by enacting the LRRA, which permits RRGs to provide additional types of liability insurance, other than product liability. Under the LRRA, a RRG is "any corporation or other limited liability association--(A) whose primary activity consists of

assuming, and spreading all, or any portion, of the liability exposure of its group members." § 3901(a)(4)(A). The LRRA continues to exempt RRGs from insurance regulation by non-chartering states, § 3902(a), with certain exceptions. See, e g, § 3902(d).

As noted, 1Source contends that its membership in a RRG exempts it from regulation by California of the sale of insurance to California consumers. This argument, however, finds no support in the Risk Retention Act. The Risk Retention Act makes it easier for insurance cooperatives to share liability, by freeing the operation of such cooperatives from the regulatory rules of multiple states. But the act does not free the members of an insurance cooperative from generally applicable state regulations governing the members' business activities that do not discriminate based on membership in RRGs. Nor does the fact that a RRG consists of members who provide insurance to consumers operate to relieve the members of the RRG from complying with generally applicable state insurance laws. Rather, the Risk Retention Act applies only to shield the provision of liability insurance coverage by a RRG for a member of the RRG from most state laws (of the non-domicile state) governing insurance.

Plaintiffs contend that § 3902(b)(1)(B), which mentions "member[s] of" RRGs, supports their position that the act broadly preempts state laws otherwise applicable to the business practices of a member of a RRG. Read in context, however, this reference to members of RRGs does not support plaintiffs' contention. Section 3902(b) provides:

> The exemptions specified in subsection (a) of this section apply to laws governing insurance business pertaining to--

> (1) liability insurance coverage provided by a risk retention group for--
>
> (A) such group; or
>
> (B) any person who is a member of such, group.

In other words, liability- insurance coverage provided by a RRG for a member of the RRG is exempt from various state laws. This section does not, however, exempt from state regulation liability insurance sold by a member of a RRG to consumers.

Neither does the state regulation of an insurance company that is a member of a RRG "indirectly" regulate the RRG and thereby violate § 3902(a)(1). The reference to "indirect" regulation contained in this section of the statute refers to the regulation of the operation of a RRG. The prohibition of a non-charter state from directly or indirectly regulating the operation of a RRG does not liberate members of a RRG in the insurance business from the power of a state to regulate insurance sold to its residents. Quite simply, the Risk Retention Act concerns liability arrangements between a RRG and its members. The Risk Retention Act does not relieve the members of a RRG from abiding by the laws of states in which they operate. Moreover, the Risk Retention Act does not discriminate among the businesses in which RRG members operate. Whether a member of a RRG sells car insurance to consumers or cars, it is not exempt from generally applicable state laws applying to its sales.

The case centrally relied upon by plaintiffs, National Warranty Ins Co RRG v Greenfield (NWIC), 214 F3d 1073 (9th Cir 2000), underscores that the preemptive effect of the

Risk Retention Act is more limited than that urged by plaintiffs. This case, moreover, reveals the weakness of plaintiffs' argument, namely, that plaintiffs have not identified a provision of California law that makes unlawful the operation of a RRG, see 15 USC § 3902(a)(1), or otherwise discriminates against RRGs by a law not generally applicable to persons or corporations, see § 3902(a)(4).

In NWIC, the Ninth Circuit considered Oregon's Service Contract Act, under which an automobile dealer was prohibited from selling service contracts unless they were registered with the Oregon Department of Consumer and Business Services (department). See id at 1075-76. In order to be registered with the department, the dealer must establish that it either has a net worth of at least $100 million or a reimbursement policy with an "authorized insurer." In order to be an "authorized insurer," an insurer must be a member of the Oregon Insurance Guaranty Association (OIGA). Pursuant to the RRA, however, RRGs are exempt from any state laws requiring membership in a state guaranty association. 15 USC § 3902(a)(2). The effect of the Service Contract Act, as interpreted by the department, therefore, was to exclude RRGs from being authorized to provide insurance to automobile dealers for the sale of vehicle service contracts:

> Because the LRRA forbids RRGs from participating in the OIGA, because an insurer may not become an "authorized insurer" without participating in the OIGA, and because the Oregon Service Contract Act allows automobile dealers to demonstrate financial responsibility through purchase of insurance only from an "authorized insurer," the Service Contract Act effectively precludes all RRGs from providing insurance coverage for motor vehicle service contracts. [citation

> omitted] Though the Service Contract Act does not mention RRGs by name, it thus operates as a categorical exclusion of RRGs. The question before us is whether such an exclusion is permitted under the LRRA.

Id at 1076.

The Ninth Circuit answered this question in the negative, holding that although it was a "close call," id at 1082, the exclusion of RRGs from operating as authorized insurers of providers of vehicle service contracts violated the Risk Retention Act's prohibition of discrimination against RRGs. See § 3902(a)(4).

The holding of the Ninth Circuit, therefore, is quite different from that which plaintiffs urge the court to adopt here. The Ninth Circuit did not hold that members of a RRG are not subject to the laws of a non-domicile state governing their business. Rather the court of appeals held that a state may not discriminate against RRGs by not permitting them to act as authorized insurers when other insurance companies are so permitted. In the instant matter, by contrast, plaintiffs have not identified any provision of California law analogous to the provision of Oregon's Service Contract Act challenged in NWIC, that would prohibit RRGs from providing liability coverage to the providers of vehicle service contracts or--to put it another way--that would prohibit a company from selling vehicle service contracts <u>because</u> of membership in a RRG. Nor is the court aware of any such provision of California law. Rather, the obstacle to 1Source's provision of vehicle service contracts directly to California consumers appears to be the requirement of California law that a company not certified to provide insurance may only sell vehicle service contracts incidental to the selling or leasing of automobiles. See California Insurance Code § 116(d). But this is a "[s]tate law

generally applicable to persons or corporations," which is expressly permitted under the Risk Retention Act. See 15 USC § 3902(a)(4)("nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations.").

Because plaintiffs have not identified any provision of California law that discriminates against RRGs or makes the operation of RRGs illegal, summary judgment is appropriate for defendants against plaintiffs' claim for relief under the Risk Retention Act. Correspondingly, plaintiffs' motion for summary judgment on this claim is denied.

III

Plaintiffs' complaint also alleges violation of a host of constitutional provisions, including "the Commerce Clause and plaintiffs' rights to due process, equal protection and privileges and immunities under the United States Constitution." Compl (Doc #l) at ¶ 31. Defendants have moved for judgment on the pleadings against these claims as well. In the main, defendants advance two general arguments in support of judgment on the pleadings against plaintiffs' constitutional claims: claim preclusion and immunity. Defendants also argue, however, that plaintiffs' constitutional claims are not adequately pled. For the following reasons, the court finds this latter assertion convincing and determines that plaintiffs' constitutional claims should be dismissed, with leave to amend.

The central argument advanced in defendants' motion for judgment on the pleadings is that plaintiffs' claims, in their entirety, are barred by claim preclusion. Defendants contend that plaintiffs raised identical arguments before the ALJ, that these arguments were rejected, that the CDOI adopted the decision of the ALJ and that this decision has become final. With respect to the issue

of finality, defendants note that plaintiffs did not file a petition for writ of mandate within the limitations period specified by California Government Code § 11523.

For the reasons discussed below, the court determines that plaintiffs' claims must be dismissed for failure to state a claim and, accordingly, the court expresses no final determination on defendants' claim preclusion argument. The court, however, has serious doubts whether plaintiffs' claims are, in fact, precluded. In particular, the court notes that the relief requested by plaintiffs before the CDOI would seem to exceed the scope of the CDOI's authority under state law. Article 3, Section 3.5 of the California Constitution provides:

> An administrative agency * * * has no power:
>
> > (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
> >
> > (b) To declare a statute unconstitutional;
> >
> > (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

Whether or not the administrative proceedings before the CDOI were of a sufficient scope to give rise to preclusion, the court is skeptical whether the judgment of that agency can preclude the litigation of plaintiffs' claims in federal court as plaintiffs' requested relief was beyond the CDOI's authority. Because plaintiffs' claims have not been sufficiently developed to permit adequate consideration, however, the court will not finally determine defendants' claim of preclusion.

Similarly, the court expresses no final opinion on defendants' claims of entitlement to immunity, although, again, the court has doubts whether defendants are immune from plaintiffs' claims as a matter of law. Defendants claim that defendants Low and Tomashoff are entitled to qualified and prosecutorial immunity and that defendants are protected from suit by the Eleventh Amendment. The court notes, however, that defendants' claims of immunity predominantly apply to claims seeking damages against state agencies and officials. In contrast, plaintiffs appear to seek prospective injunctive relief against state officials for a purported ongoing violation of federal law. Such suits against state officials are not considered suits against the state and are generally not barred. See Will v Michigan Dept of State Police, 491 US 58, 71 n10 (1989), citing Kentucky v Graham, 473 US 159, 167 n14 (1985), Ex Parte Young, 209 US 123, 159-160 (1908).

But the fundamental problem with plaintiffs' constitutional claims is that they are not sufficiently pled to permit adequate consideration or rejoinder. Plaintiffs' complaint does not contain any specific allegations in support of the constitutional claims, but merely appends conclusory allegations of constitutional violations to its claims under the Risk Retention Act. Accordingly, although the court has determined that it must treat defendants' motion on plaintiffs' Risk Retention Act claims as one for

summary judgment, plaintiffs' constitutional claims are not appropriately considered under the summary judgment standard. No extrinsic evidence needs to be consulted to consider plaintiffs' claims; rather for failing to allege any facts supporting the conclusory allegations of constitutional violation, plaintiffs' claims must be dismissed as a matter of law.

Judgment on the pleadings may be applied to individual causes of action. See Moran v Peralta Community College Dist, 825 F Supp 891, 893 (ND Cal 1993). "Courts have discretion to grant leave to amend in conjunction with 12(c) motions, and may dismiss causes of action rather than grant judgment." Id, citing Amersbach v City of Cleveland, 598 F2d 1033, 1038 (6th Cir 1979). Because plaintiffs have failed to allege claims of constitutional violations, the court determines that these claims must be dismissed. Plaintiffs may, however, amend their complaint to allege the facts giving rise to their claims of constitutional violations.

IV

To summarize, because plaintiffs were given a full opportunity to present their Risk Retention Act claim and extrinsic evidence was considered, in disposing of this claim, summary judgment is appropriate against plaintiffs on the Risk Retention Act claim. Plaintiffs' motion for partial summary judgment (Doc #36) is, therefore, DENIED. Defendants' motion for partial summary judgment (Doc #31) is GRANTED. The court has considered defendants' challenge to plaintiffs' remaining claims, alleging constitutional violations, under the judgment on the pleadings standard of FRCF 12(c). Defendants' motion for judgment on the pleadings against plaintiffs' constitutional claims (Doc #31) is GRANTED. Plaintiffs' constitutional claims are dismissed without prejudice. Plaintiffs may file

an amended complaint consistent with this order within 30 days of the entry of this order. Plaintiffs' motion to amend (Doc #28) TERMINATED as moot. As an administrative matter. Doc #10 is also TERMINATED.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PRIMEGUARD INSURANCE CO and
1SOURCEWARRANTY.COM, INC,

Plaintiffs, No C-02-0748 VRW

v. ORDER

HARRY W LOW, California
Insurance Commissioner, the
CALIFORNIA DEPARTMENT OF
INSURANCE and JON A TOMASHOFF,

Defendants.
_____/

[ENTERED: June 25, 2002]

Defendants move for judgment on the pleadings. Doc #31. Plaintiffs move to file an amended complaint, adding relevant facts occurring subsequent to the filing of this lawsuit. Doc #28. The court finds this matter appropriate for disposition without oral argument. See Civ LR 7-1(b). The hearing scheduled for June 27, 2002, is hereby VACATED.

I

Plaintiffs filed suit on February 12, 2002, asserting that the cease and desist order issued to 1Source by the California Department of Insurance (CDOI) violated federal law and seeking declaratory and injunctive relief, enjoining enforcement of the cease and desist order. Doc #1. On February 20, 2002, plaintiffs moved for a preliminary injunction. Doc #4. On May 9, 2002, the court, in essence,

denied the preliminary injunction motion without prejudice, determining that the issues had not yet been sufficiently developed to enable the court to make a preliminary injunction determination.. See Tr (Doc #29) at 46:3-6.

Defendants subsequently filed the instant motion, styled as a motion for judgment on the pleadings, pursuant to FRCP 12(c). As defendants note, however, "[a] defendant may use a rule 12(c) motion after the close of the pleadings to raise various rule 12(b) defenses regarding procedural defects, in which case courts apply the same standard applicable to the corresponding 12(b) motion." Alexander v City of Chicago. 994 F2d 333, 336 (7th Cir 1993). Accordingly, in the instant motion defendants raise arguments under FRCP 12(b)(1) and (6).

FRCP 12(c) provides:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matter outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in [FRCP] 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by [FRCP] 56.

Courts may grant partial judgment pursuant to FRCP 12(c) and may exercise discretion to dismiss causes of action with leave to amend, rather than granting judgment. See Moran v Peralta Community College Dist. 825 F Supp 891, 893 (ND Cal 1993). "Although [FRCP] 12(c) differs in some particulars from [FRCP] 12(b)(6), the standard applied

is virtually identical." Id, citing Miller v Indiana Hosp. 562 F Supp 1259, 1266 (DC Pa 1983). In considering a FRCP 12(b)(6) motion to dismiss, all material allegations in the complaint must be taken as true and construed in the light most favorable to the plaintiff. The plaintiff's version of the facts, therefore, controls. Pareto v FDIC, 139 F3d 696, 699 (9th Cir 1998). Dismissal is only appropriate when it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v Gibson, 355 US 41, 45-46 (1957).

Despite the apparent absence of material factual issues in dispute, plaintiffs contend that the court should consider defendants' motion as one for summary judgment, because defendants have submitted matter outside of the pleadings. Defendants have, in fact, submitted the declaration of a staff counsel of the CDOI, Kathleen Morgan, who avers to certain historical facts and attaches documents relating to the issuance of the cease and desist order and subsequent events. See Doc #31.

Defendants have not filed a request for judicial notice. Nor does it appear that the court could take judicial notice of all the attachments to Morgan's declaration. Although courts are able to take judicial notice of "records and reports of administrative bodies," Interstate Natural Gas Co v Southern California Gas Co, 209 F2d 380, 385 (9th Cir 1953), without transforming a motion to dismiss into one for summary judgment. Mack v South Bay Beer Distributors, 798 F2d 1279, 1282 (9th Cir 1986), Morgan's declaration also contains factual averments and records of communication between plaintiffs and the CDOI.

Defendants contend that the submission of such material does not transform the instant motion into one for summary judgment because this material was submitted as part of defendants' "speaking motion" challenging the

existence of subject matter jurisdiction, pursuant to FRCP 12(b)(1). See Def Br (Doc #31) at 4, citing Thornhill Publishing Co, Inc v Gen'l Tel & Electronics Corp, 594 F2d 730, 733 (9th Cir 1979); Def Rep Br (Doc #35) at 2. The basis of defendants' challenge to the court's subject matter jurisdiction is not clearly articulated, but it appears that defendants are challenging plaintiffs' assertion of federal Question jurisdiction on the basis that plaintiffs' federal claims—i.e., all of plaintiffs' claims—are frivolous. Def Rep Br (Doc #31) at 3.

"Where a jurisdictional issue is separable from the merits of the case, the judge may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary," without converting a FRCF 12(b)(1) speaking motion into one for summary judgment. Thornhill Publishing, 594 F2d at 733. The court is not convinced, however, that the "jurisdictional issue" raised by defendants--the frivolity of plaintiffs' complaint--is separable from the merits of the case. Moreover, the evidence submitted by defendants is referenced most often in defendants' contention that plaintiffs' complaint is barred by issue and claim preclusion, which is not an issue of jurisdict.

Accordingly, the court determines that it must either exclude the material outside the pleadings submitted by defendants or treat defendants' motion as one for summary judgment and ensure that both parties have an opportunity to present all material made pertinent to such a motion by FRCP 56. See FRCP 12(c). Although the court may be able to resolve some of the issues raised by defendants' motion by excluding the submitted evidence, this course of action seems neither efficient nor necessary. Plaintiffs have filed a motion for partial summary judgment on their central claim, asserting that defendants' actions are preempted by the Risk Retention Act. Doc #36. The court's consideration of the

instant motion will benefit from being considered in conjunction with plaintiffs' motion for summary judgment. Moreover, consolidating the motions will ensure that both parties have the opportunity to present material pertinent to defendants' present motion, which, for the foregoing reasons, will be treated as a summary judgment motion pursuant to FRCP 56.

Accordingly, the court hereby sets a hearing date of August 15, 2002, at 2 pm on defendants' motion for summary judgment (Doc #31), plaintiffs' motion for partial summary judgment (Doc #36) and plaintiffs' motion to file amended complaint (Doc #28).

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PRIMEGUARD INSURANCE COMPANY, INC., (RRG), and 1SOURCEAUTOWARRANTY.COM, INC, Plaintiff- Appellant, v. HARRY W. LOW, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, THE CALIFORNIA DEPARTMENT OF INSURANCE, AND JON A. TOMASHOFF, Defendant - Appellee.	No. 03-17196 D.C. No. CV-02-00748-JSW Northern District of California, San Francisco ORDER

[ENTERED: January 28, 2005]

Before; OAKES,* KLEINFELD, and CALLAHAN, Circuit Judges.

Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc is denied.

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* The Honorable James L. Oakes, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[ENTERED: September 18, 2002]

PRIMEGUARD INSURANCE COMPANY, INC. (RRG), and 1SOURCEAUTOWARRANTY.COM, INC.

Plaintiffs,

v.

HARRY W. LOW, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, THE CALIFORNIA DEPARTMENT OF INSURANCE, and JON A. TOMASHOFF,

Defendants.

Case No. 02-748-VRW

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

PrimeGuard Insurance Company, Inc. (RRG) ("PrimeGuard") and 1SourceAutoWarranty.com, Inc. ("1Source") complain of defendants as follows:

NATURE OF ACTION. JURISDICTION AND VENUE

1. This action arises under the United States Constitution and 15 U.S.C. § 3901, *et seq.*, originally enacted as the Product Liability Risk Retention Act of 1981, and subsequently amended to the Federal Liability Risk Retention Act of 1986 ("Risk Retention Act").

2. By this action, plaintiffs seek a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202 ("Declaratory Judgment Act"), because there is an actual and justiciable controversy within the jurisdiction of this Court concerning the rights of the parties under the Risk Retention Act and 42 U.S.C. 1983 arising out of an *ex parte* cease and desist order issued by defendant Harry W. Low, insurance Commissioner of the State of California ("Commissioner")

dated August 29, 2001, in the matter of 1SourceAutoWarranty.com, Inc., File No. VSC 080-AP. A copy of the August 29, 2001 C&D Order is attached as Exhibit 1.

3. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331 and 1337. This Court also has jurisdiction pursuant to 28 U.S.C. § 1332 on the basis that the matter in controversy exceeds the sum of $75,000, exclusive of interest and costs, and there exists complete diversity of citizenship between the plaintiffs and defendants.

4. Venue properly lies in this Court pursuant to 28 U.S.C. § 1391(b) and in that a substantial part of the events or omissions giving rise to the claims stated herein occurred in this judicial district.

5. On August 19, 2002, this Court granted the Plaintiffs' leave to file this Amended Complaint.

THE PARTIES

6. Plaintiff PrimeGuard is a risk retention insurance company domiciled in the State of Hawaii with its principal place of business in Hawaii and duly authorized to do business by the Hawaii Division of Insurance. PrimeGuard is also duly registered as a risk retention group in the State of California in accordance with the California Risk Retention Act of 1991.

7. Plaintiff 1Source, a member of PrimeGuard, is a Colorado corporation with its principal place of business in Colorado and is authorized to do business in California.

8. Defendant Department of Insurance of the State of California is a duly established state administrative agency exercising administrative and executive powers in the State of California.

9. Defendant Harry W, Low is the Insurance Commissioner of the California Department of Insurance and has acted under color of state law with the intent and purpose of unlawfully discriminating against Plaintiffs. Defendant Low is sued in both his official and individual capacities.

10. Defendant Jon A. Tomashoff is the Senior Staff Counsel of Defendant Department of Insurance and has acted under color of state law with the intent and purpose of unlawfully discriminating against Plaintiffs. Defendant Tomashoff is sued in both his official and individual capacities.

FACTS

A. Background

11. PrimeGuard is an RRG formed pursuant to the Federal Product Liability Risk Retention Act of 1981, 15 U.S.C. § 3901, *et seq.*, amended in 1986 by the Federal Liability Risk Retention Act of 1986 ("Risk Retention Act," "RRA" or "Act").

12. PrimeGuard commenced doing business as a duly licensed insurance company under the laws of the State of Hawaii on April 6,1998.

13. Hawaii is the domiciliary state for PrimeGuard under the Risk Retention Act.

14. PrimeGuard filed for registration in California as a risk retention group in March of 1999.

15. In its business, PrimeGuard insures payment under vehicle service agreements ("VSAs") issued by its members in most states and the District of Columbia. These vehicle service agreements protect automobile owners who purchase VSA's by paying for repairs to automobiles covered by the terms of such VSAs. These VSAs are administered by PrimeGuard's members. The risk retention group members are the named insureds under PrimeGuard policies, and the automobile owners are the beneficiaries of this insurance if for any reason a risk retention group member such as 1Source fails to perform its obligations.

16. Plaintiff 1Source is what is commonly referred to in the service contract business as an "administrator-obligor." 1Source sells VSAs to the public over the Internet.

17. 1Source also provides insurance related services, management, administration, and underwriting for PrimeGuard. Under the insurance contract between PrimeGuard and 1Source, PrimeGuard insures 1Source's contractual obligations against claims brought by automobile owners if 1Source fails to pay for covered repairs. 1Source is the insured party and the individual automobile owners are the third party beneficiaries of PrimeGuard's policy with 1Source. 1Source's VSA specifically informs consumers that the VSA is not an insurance policy:

> You are reminded that your VSA is not an insurance policy. However, it is an insured service contract. In the event that the Admjnistrator fails to authorize covered repairs or authorized repair claims within

> sixty (60) days after all proper proof of loss documents have been filed it, You are entitled to make a direct claim against PrimeGuard.

18. 1Source is one of PrimeGuard's most active group members, accounting for approximately 70% of PrimeGuard's business.

B. Specific Allegations of Constitutional Violations

19. On or about August 29, 2001, Defendants Low and California Department of Insurance ("CDOI"), without notice or an opportunity to be heard as to either 1Source or PrimeGuard, created a document entitled "Order to Cease and Desist" ("C&D Order") (Exhibit 1) and sent it to 1Source. CDOI did not request that the C&D Order be issued by an independent judicial officer acting through a court of competent jurisdiction as required by the RRA under 15 U.S.C. §3902(a)(1)(G).

20. Although the order was directed to 1Source, it directly impacted and regulated the operations of PrimeGuard by prohibiting its member, 1Source, from doing business in California.

21. On September 10, 2001, 1Source requested a hearing on the validity of the C&D order under the Federal Risk Retention Act. Rather than set the matter for an immediate hearing, on its *ex parte* order the CDOI instead set the matter for a hearing on December 10, 2001, more than a hundred days after the issuance of the C&D Order. 1Source was informed that the December 10, 2001 date was the earliest hearing date available. 1Source was not responsible for the delay in the hearing date although it has been irreparably prejudiced by the delay.

22. Upon receipt of the C&D Order, 1Source attempted to cooperate with the CDOI and comply with the terms of the Order by conforming to the requirements of California Insurance Code §116(d), even though 1Source believed that it was exempt from the statute and order under the RRA. 1Source has gone to considerable lengths to satisfy the requirements of California Insurance Code §116(d) to be a good corporate citizen. 1Source has communicated its compliance to the CDOI but the CDOI has refused and continues to refuse to dissolve the C&D Order.

23. On December 10, 2001, a hearing was held on the C&D Order before an administrative law judge working for the CDOI. At the hearing, the CDOI called as its chief witness its own senior staff attorney, Defendant Tomashoff, who testified that the CDOI has a "special project" where it pursues only out-of-state companies doing business over the internet for compliance of California Insurance Code §116(d). Mr. Tomashoff further testified that there were three employees who worked on this project. At the same time, Mr. Tomashoff testified that the CDOI does not investigate California automobile dealers for compliance with §116(d) and it has no investigators assigned to investigate California automobile dealers for compliance with §116(d). In summary, Mr. Tomashoff testified that §116(d) was only enforced against out-of-state companies.

24. Under California law, the administrative law judge working for CDOI does not decide on the matters before him but instead issues a "recommendation" which may or may not be accepted by Defendant Low.

25. The Administrative Law Judge has failed to issue any recommendation as to the C&D Order directed

to 1Source at the hearing and took the matter under advisement.

C. Violations of the Equal Protection Clause

26. Defendant Tomashoff is the head of a "special project" within the CDOI. Under Tomashoff s direction, the CDOI's "special project" actively pursues only out-of-state companies doing business over the Internet for noncompliance with CIC §116(d). This "special project" is staffed by three employees of the CDOI, one of which is Defendant Tomashoff. The CDOI does not have a similar project to investigate California companies and automobile dealers for compliance with §116(d) and it has no investigators assigned to investigate California companies and automobile dealers for compliance with §116(d). The actions of the CDOI, Low and Tomashoff violate the Equal Protection Ciause, which forbids a state to discriminate in favor of its own residents solely by burdening the residents of other states.

27. California consumers receive a significant financial benefit through the sale of VSAs over the Internet. Automobile dealers sell the same type of warranty for a price which is twenty percent (20%) and fifty percent (50%) more than the price charged by Internet companies. It is prejudicial to California consumers to limit the sale of warranties over the Internet.

28. The selective enforcement of CIC §116 against Internet companies improperly limits competition with California companies and automobile dealerships. Automobile dealerships receive a significant amount of revenue from the sale of automobile warranties. Defendants CDOI, Low and Tomashoff's selective enforcement of CIC §116 against out of state companies while at the same time declining to enforce the same section against California

companies improperly burdens nonresidents. The CDOI selectively enforced the provisions of CIC §116(d) against 1Source while allowing numerous California automobile dealers and companies with similar warranties to operate without restriction. In addition, the CDOI, Low and Tomashoff have approved numerous warranties as in compliance with CIC §116 even though these warranties provide the same type or greater coverage as 1Source. Inexplicably, the CDOI refuses to approve the 1Source VSA.

D. Violations of the Commerce Clause

29. Upon information and belief, In January 2002, Defendant Tomashoff and other members of the CDOI's "special project" began to contact 1Source's nationwide business associates and advertisers via e-mail and telephone. Defendant Tomashoff threatened 1Source's associates and advertisers that if they continued to carry internet "links" or advertisements on their websites to the 1Source website, Defendant Low would commence an enforcement action against them for "aiding and abetting" violations of California law. An example of one of Defendant Tomashoff s e-mails is attached hereto as Exhibit 2.

30. The CDOI, Low and Tomashoff seek to prevent the Plaintiffs from advertising on the Internet under CIC §702 and 703.1 as enforced through the C&D Order. The C&D Order, paragraph 5, specifically seeks to enjoin the Plaintiffs from "otherwise communicating regarding one or more terms of an agreement to provide insurance or an insurance policy with a California resident" through the internet. To comply with this provision, the Plaintiffs would be required to remove its advertising from a large number of Internet advertising sites advertising their product. The e-mail attached as Exhibit 2 is an example of California's attempt to limit the 1Source's advertising outside of the

State of California. The C&D Order, CIC §§702 and 703.1 seek to prevent the Plaintiffs from advertising their product over the internet. The extraterritorial impact of C&D Order, CIC §§702 and 703.1 violates the Commerce Clause of the United States Constitution.

IRREPARABLE HARM

31. The *ex parte* C&D Order has caused irreparable harm to PrimeGuard and its group members, including 1Source, during the Defendant's five month delay in ruling upon the validity of the C&D Order. This irreparable harm will continue each day that the Defendants delay in ruling upon the C&D Order.

32. 1Source will suffer further irreparable harm in that it is under contractual obligations to provide vehicle service agreements and will be unable to fulfill those contractual obligations so long as the C&D Order is in effect. This will likely force companies to leave the 1Source and PrimeGuard Programs for some other source, leaving 1Source and PrimeGuard in a position where they may never be able to recover their market position or to continue their operations. Plaintiffs' are also harmed by Defendant Tomashoff's conduct in contacting 1Source's advertisers and intentionally interfering with 1Source's business relationships.

33. On March 11, 2002, well after the filing of this suit, the ALJ submitted to Defendant Low a proposed decision sustaining the C&D Order. On March 21, 2002, Defendant Low adopted the proposed decision of the ALJ. The original C&D order is void *ab initio* and the subsequent proceedings, including the March 21, 2002 order sustaining the C&D order are also void for the reasons set forth below.

COUNT I
DECLARATORY JUDGMENT
CASE AND CONTROVERSY

34. Plaintiffs incorporate, as if fully set forth herein, the allegations contained in paragraph 1 through 33 above.

35. Before the CDOI and the CDOI's administrative law judge, 1Source and PrimeGuard contended that under the Risk Retention Act, 15 U.S.C. §§ 3902(a)(1)(h) and 3902(e)(2), Defendant Low and Defendant CDOI could not enter an *ex parte* C&D order unless they petitioned a "federal or state court of competent jurisdiction" for such relief. (Emphasis added). Under the Risk Retention Act only a court of competent jurisdiction independent of the CDOI can issue an injunction against a risk retention group and its members. Here, Defendants Low and the CDOI themselves issued the *ex parte* C&D Order.

36. The C&D Order was issued on grounds which directly conflict with or are in violation of the Risk Retention Act, particularly 15 U.S.C. §§ 3902(a) and (b). The C&D Order is a violation of federal law which expressly preempts the field and prohibits a non-domiciliary state - subject to narrow exemptions - from regulating or attempting to regulate, directly or indirectly, a risk retention group or their members.

37. The Risk Retention Act sets out minimum procedures that non-domiciliary states, such as California in this case, must follow in order to obtain injunctive relief against a risk retention group or its members. These procedures insure that risk retention groups and their members are afforded the due process rights that would exist if the CDOI brought the matter before a court of competent jurisdiction, such as the right to an impartial

decision maker. Further, a court would have applied the legal standards for issuing an injunction, including the balancing of the harm and the likelihood of succeeding on the merits. The CDOI instead issued an indefinite, *ex parte* Temporary Restraining Order without making the findings that would be required if the CDOI petitioned an independent state or federal court as required by the Risk Retention Act. Defendants' actions have deprived 1Source and PrimeGuard of their due process rights intended by the Risk Retention Act.

38. An issue in controversy exits between Plaintiffs and Defendants as to whether the C&D Order, violates the Risk Retention Act and violates the Commerce Clause and plaintiffs' rights to due process, equal protection and privileges and immunities under the United States Constitution. This dispute requires the resolution of important questions of federal statutory and constitutional law. Plaintiffs are entitled to declaratory relief.

COUNT II
VIOLATION OF DUE PROCESS UNDER
COLOR OF STATE LAW

39. Plaintiffs incorporate, as if fully set forth herein, the allegations contained in paragraphs 1 through 38, inclusive, above.

40. Defendants' actions, taken in both their individual and official capacities as set forth above constitute actions taken under color of state law with the intent and purpose of unlawfully discriminating against Plaintiffs thereby denying their rights to due process, equal protection and privileges and immunities under the United States Constitution and the Risk Retention Act.

41. Defendants CDOI, Low and Tomashoff's violations of the Risk Retention Act, as set forth in paragraph 10-31 above, in both their official and individual capacities, violates the Plaintiffs' right to due process under the United States Constitution.

42. Defendants CDOI, Low and Tomashoff's actions in selectively enforcing CIC §116 (as set forth in greater detail in paragraphs 26 through 28 above) against out of state companies but not against companies and automobile dealers based in California are arbitrary and violates the Equal Protection Clause of Fourteenth Amendment of the United States Constitution. The Defendants created and staffed a "special project" to pursue only out of state companies operating over the Internet and such policy violates the Equal Protection Clause. The Defendants have not created a similar project to enforce CIC §116 against California companies and automobile dealers. Defendant Tomashoff knew of the conduct as a result of his position as the supervising member of the "special project" and knew of the unlawful and discriminatory effect of the project. Low, as the supervisory of the CDOI, knew or should have known of the unlawful and discriminatory effect of the project. The Defendants have acted with the intent and purpose of discriminating against out of state companies (such as the Plaintiffs) through the selective enforcement of CIC §116(d) to unlawfully protect California companies and automobile dealers from out of state competition.

43. Defendants CDOI, Low and Tomashoff's actions in seeking to regulate commerce outside of California's territorial limits by blocking 1Source and PrimeGuard's nationwide Internet advertising (as set forth in greater detail in paragraphs 29 and 30 above) violates the Commerce Clause of the United States Constitution. Defendants Tomashoff and Low have directed 1Source,

through the C&D Order (Exhibit 1), to stop advertising over the Internet because California residents may happen to view the viewing the advertisements even though these Internet advertisements reach markets far beyond California's border. Defendant Low's C&D Order directs 1Source to "cease and desist from directly marketing automobile service contracts to California consumers by the internet, telephone, mail, advertising, or any other means" thereby restricting all of the Plaintiffs' advertising over the Internet to non-California residents. Defendant Tomashoff has contacted the Internet website eBay, seeking to force the eBay to stop carrying 1Source's advertisements. Defendant Tomashoff told eBay that by providing an advertisement for 1Source on its nationwide website, "eBay could be found to be adding and abetting the (allegedly) illegal transaction of insurance in this State by 1Source." See Exhibit 2. The Commerce Clause invalidates a state law that regulates markets outside the state's borders, even if the extraterritorial reach was unintended by the state legislature. The McCarran-Fergusson Act does not allow states to regulate activities carried on beyond its own borders. The Defendants CDOI, Low and Tomashoff have acted with the intent and purpose of prohibiting Plaintiffs from advertising their services outside of the state of California.

44. Defendants knew or should have known that their conduct, as set forth above, would have the effect of denying Plaintiffs their right to due process, equal protection and privileges and immunities under the United States Constitution and the Risk Retention Act.

45. An issue in controversy exits between Plaintiffs and Defendants as to whether the C&D Order violates the Commerce Clause and Plaintiffs' rights to equal protection under the United States Constitution. This dispute requires the resolution of important questions of

constitutional law. Plaintiffs are entitled to declaratory relief.

WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

(a) A declaratory judgment that the Defendants Low and the CDOI, not being a court of competent jurisdiction under the Risk Retention Act, did not have jurisdiction to issue the C&D Order;

(b) A declaratory judgment that the C&D Order is in violation of the rights granted Plaintiffs under the Risk Retention Act;

(c) A declaratory judgment that the C&D Order, the selective enforcement of CIC §116(d) and the extraterritorial effect of the C&D Order violates Plaintiffs' due process and equal protection rights under the United States Constitution;

(d) A declaratory judgment rescinding and declaring void the C&D Order as an unlawful regulation of a Risk Retention Group and its members;

(e) The issuance of a preliminary and permanent injunction enjoining Defendants from enforcing the C&D Order;

(f) An award to Plaintiffs of their costs of this action, including reasonable attorneys' fees as permitted by law; and

(g) Such further relief as the Court may deem just and appropriate.

COHEN GETTINGS, P.C.

By:___/s/_____
John C. Pasierb

ROPERS, MAJESKI, KOHN & BENTLEY
Bv:___/s/_____
Attorneys for Plaintiffs

Attorneys for Plaintiffs
1Sourceautowarranty.com, Inc.,
d/b/a 1sourceautowarranty.com; and
PrimeGuard Insurance Company, Inc. (RRG)

EXHIBIT 1

BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA

In the Matter of 1SOURCEAUTOWARRANTY.COM, INC. d.b.a. 1SOURCEAUTOWARRANTY.COM Respondent	ORDER TO CEASE AND DESIST and NOTICE OF RIGHT TO HEARING (Ins. Code § 12921.8) File No. VSC OSO-AP

ORDER TO CEASE AND DESIST

TO: 1SOURCEAUTOWARRANTY.COM, INC. d.b.a. 1SOURCEAUTOWARRANTY.COM:

YOU ARE HEREBY ORDERED IMMEDIATELY TO CEASE AND DESIST FROM DIRECTLY MARKETING AUTOMOBILE SERVICE CONTRACTS TO CALIFORNIA CONSUMERS BY THE INTERNET, TELEPHONE, MAIL, ADVERTISING, OR ANY OTHER MEANS.
WHEREAS:

1. Respondent 1Sourceautowarranty.com. Inc. (hereafter "1Sourceautowarranty") acts as a "third party obligor" of automobile service contracts. 1Sourceautowarranty is not licensed as an insurance agent or broker and is not an automobile deafer. 1Sourceautowarranty sells automobile service contracts

directly to California-consumers over the Internet. Further, 1Sourceautowarranty is acting as an insurance company, without a certificate of authority to do so, by selling third party obligar automobile service contracts without complying with California Insurance Code ("CIC") § 116(d). Therefore, 1Sourceautowarranty is in violation of CIC § 700(a) and (b).

2. Pursuant to CIC § 116, automobile service contracts issued by a third party obligor constitutes automobile insurance, unless the obligor of those contracts compiles with the requirements of CIC § 116(d).

3. Pursuant to CIC § 116(d), automobile service contracts can only be sold by an automobile dealer incidental to the automobile dealer's business of selling or leasing automobiles.

4. Pursuant to CIC § 116(a) doing or proposing to do any business in substance equivalent to the business described in CIC § 116 in a manner designed to evade the provisions of this section is the doing of an insurance business.

5. Pursuant to CIC § 702 and 1726(b) transacting Insurance is defined as providing a quote, accepting an application for coverage, or otherwise communicating regarding one or more terms of an agreement to provide insurance or an insurance policy with a California resident.

6. CIC § 12921.8(a) authorizes the Insurance Commissioner to issue a cease and desist order against any person transacting the business of insurance without having been issued a certificate of authority.

7. CIC § 12921.8(a) authorizes the Insurance Commissioner to Issue a cease and desist order without holding a hearing prior to issuance of the order.

PLEASE TAKE NOTICE that pursuant to CIC § 12921.8(a), the Insurance Commissioner may impose a fine of up to five thousand dollars ($5,000) for each day this order is violated.

NOTICE OF RIGHT TO HEARING

CIC § 12921.8(b) provides in part as follows: "A person to whom a cease and desist order is issued, may, within seven days after service of the order, request a hearing by filing a request for a hearing with the commissioner." Your written request for a hearing must be directed to: Kathleen L. Morgan, Staff Counsel, California Department of Insurance, 45 Fremont Street, 21st Floor, San Francisco, California 94105.

IN WITNESS WHEREOF, I have set my hand and affixed my official seal this 29th day of August, 2001.

HARRY W. LOW
Insurance Commissioner

By: /s/
PATRICIA K. STAGGS
Assistant Chief Counsel

EXHIBIT 2

eBay, Inc.
145 Hamilton Ave.
San Jose, CA 95125

Dear Mr. Lanciault:

As we discussed on the telephone this morning, the California Department of Insurance learned yesterday that eBay is providing a link to 1Source Auto Warranty, from which California residents may purchase automobile extended service contracts.

Third party obligor service contracts offered to California residents must comply with California Insurance Code section 116(d). Among the requirements of that section: The obligor must possess a California fire and casualty broker-agent license (116(d)(2)), and have posted a security deposit with the Insurance Commissioner (116(D)(3)(A)(2). 1Source has not complied with either of these requirements.

In addition, 116(d) states that service contracts may only be sold "...by an automobile dealer incidental to the automobile dealer's business of selling or leasing automobiles..." Based on this language, warranty companies may not sell service contracts directly to consumers over the internet.

Because 1Source has apparently violated Insurance Code section 116(d), on or about August 29, 2001, the California Department of Insurance issued and served 1Source with an immediate cease and desist order. A copy of that order can be found by searching for 1Source at http://www.insurance.ca.gov/docs/FS-EAPleading.htm.
By providing a link to 1Source, eBay could be found to be aiding and abetting the (alleged) illegal transaction of

insurance in this State by 1Source, and thus be subject to an enforcement action by the Insurance Commissioner.

1Source requested and received a hearing before an administrative law judge on the propriety of the Department's cease and desist order. A proposed decision is expected shortly, in the only other such case brought by the Department for which a proposed decision has been obtained, the ALJ upheld the Department's cease and desist order. The Department expects a similar result in the case of 1Source. In the meantime, the order is in effect, but apparently has not been complied with.

1Source has not yet exhausted its administrative and other legal remedies with regard to the Department's cease and desist order. 1Source has raised several defenses to the Departments action. eBay should evaluate those defenses and make its own conclusion before taking any action that affects its relationship with 1Source.

You are welcome to phone or e-mail me with any questions.

Sincerely,

Jon A. Tomashoff, CPCU, Senior Staff Counsel
California Department of Insurance, Legal Division
45 Fremont Street, 21st Floor
San Francisco, CA 94105
TEL: 415 538-4119
FAX: 415-904-5490
E-Mail: tomashoffj@insurance.ca.gov

EXHIBIT 7

STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE

In the Matter of the Order to Cease and Desist Against: WARRANTY GOLD, LTD. dba WARRANTYGOLD.COM, Respondent	File No. VSC 073-AP OAH NO. N2001080303 **DECISION AND ORDER ADOPTING PROPOSED DECISION**

DECISION

The Administrative Law Judge, Ruth S. Astle, submitted her Proposed Decision, dated December 11, 2001, and recommended its adoption as the decision of the Insurance Commissioner. The Commissioner then considered the adoption of the Proposed Decision.

Now, therefore, pursuant to the provisions of California Government Code Section 11517(c)(2)(A), JT IS SO ORDERED that the attached Proposed Decision is hereby adopted by the Insurance Commissioner as his Decision in this matter and is ordered officially filed.

This Decision shall be effective immediately.

IT IS SO ORDERED this 11th day of January 2002.

HARRY W. LOW
Insurance Commissioner

By: /s/
REID A. McCLARAN
Deputy

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Insurance Commissioner,
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PRIMEGUARD INSURANCE COMPANY, and 1SOURCEAUTOWARRANT.COM., INC Plaintiffs, v. HARRY W. LOW, in his capacity as California Insurance Commissioner, the CALIFORNIA DEPARTMENT OF INSURANCE, and JON A. TOMSHOFF, Defendants.	CASE NO. C 02-0748 VRW **ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT**

[ENTERED: March 28, 2002]

Defendants Harry Low, in his capacity as California Insurance Commissioner, the California Department of Insurance, and Jon A. Tomashoff (hereinafter collectively referred to as the "Department") hereby answer the Complaint for Declaratory Judgment on file in the above-captioned action by admitting, denying, and alleging as follows:

1. The Department denies, generally and specifically, each and every allegation contained in paragraphs 1, 18, 24, 25, and 26 of the complaint.

2. The Department denies, generally and specifically, each and every allegation contained in paragraph 2 of the complaint, save and except that the Department admits that Exhibit "A" to the complaint is a copy of the Order to Cease and Desist and Notice of Right to Hearing that the Department issued to plaintiff 1SourceAutoWarranty.Com., Inc. (hereinafter "1Source"), in File No. VSC 080-AP.

3. The Department denies, generally and specifically, each and every allegation contained in paragraph 3 of the complaint, save and except that the Department admits the allegations beginning with the word "there" on page 2, line 13, and ending with the word "defendants" on page 2, line 14.

4. Answering paragraph 4 of the complaint, the Department alleges that it does not dispute venue in this court. Except as expressly alleged, the Department denies, generally and specifically, each and every remaining allegation contained in paragraph 4.

5. The Department lacks sufficient information and belief to enable it to answer the allegations contained in the first sentence of paragraph 5 of the complaint and,

making its denial on that ground, denies, generally and specifically, each and every allegation contained in that sentence. The Department denies generally and specifically, each and every remaining allegation contained in paragraph 5. The Department further alleges that plaintiff Primeguard Insurance Company, Inc. (hereinafter "Primeguard") is registered as a foreign risk retention group in California offering contractual insurance that the United States Court of Appeal for the Ninth Circuit has considered to be liability insurance within the meaning of the Federal Liability Risk Retention Act of 1986, Title 15 U.S.C. § 3901 *et seq.*

6. The Department lacks sufficient information and belief to enable it to answer the allegations in paragraph 6 of the complaint beginning with the word "Plaintiff on page 2, line 24, and ending with the word "Colorado" on page 2, line 25 and, making its denial on that ground, denies, generally and specifically, each and every allegation contained therein. The Department denies, generally and specifically, each and every remaining allegation contained paragraph 6.

7. The Department denies, generally and specifically, each and every allegation contained paragraph 7, and further alleges that the California Department of Insurance is an independent department of the State of California under the control of the California Insurance Commissioner. (Cal. Insurance Code § 12906.)

8. Answering paragraph 8 of the complaint, the Department denies, generally and specifically, each and every allegation beginning with the word "and" on page 3, line 2 and ending with the word "Plaintiffs" on page 3, line 3.

9. Answering paragraph 9 of the complaint, the Department denies the word "the" on page 3, line 4, and

denies, generally and specifically, each and every allegation beginning with the word "and" on page 3, line 5 and ending with the word "Plaintiffs" on page 3, line 6.

10. The Department lacks sufficient information and belief to enable it to answer the allegations contained in paragraphs 10, 11, 12, 13, 14, and 16 of the complaint and, making its denial on that ground, denies, generally and specifically, each and every allegation contained in those paragraphs.

11. The Department admits the allegations contained in paragraph 15 of the complaint, save and except that the Department denies, generally and specifically the second sentence of the paragraph, beginning on page 3, line 24, and ending on page 3, line 25, and the fifth sentence of that paragraph beginning on page 4, line 1, and ending on page 4, line 5.

12. The Department denies, generally and specifically, each and every allegation contained in paragraph 17 of the complaint. The Department further alleges that Exhibit "A" to the complaint is a copy of the Order to Cease and Desist and Notice of Right to Hearing that the Department issued to plaintiff 1Source in File No. VSC 080-AP.

13. Answering paragraph 19 of the complaint, the Department alleges that on September 10, 2001, plaintiff 1Source requested a hearing on the Order to Cease and Desist and Notice of Right to Hearing in accordance with California Insurance Code section 12021.8(b) and that the hearing was held on December 10, 2001. Except as expressly alleged, the Department denies, generally and specifically, each and every allegation contained in that paragraph.

14. The Department denies, generally and specifically, each and every allegation contained in paragraph 20 of the complaint. The Department further admits that the Order to Cease and Desist remains in effect.

15. Answering paragraph 21 of the complaint, the Department admits that part of the first sentence beginning with the word "On" on page 5, line 3, and ending with the word "judge" on page 5, line 4. The Department denies, generally and specifically, each and every remaining allegation contained in that paragraph.

16. The Department denies, generally and specifically, each and every allegation contained in paragraph 22 of the complaint. The Department alleges that, under California law, an administrative law judge issues a "proposed decision" that may or may not be adopted by the Insurance Commissioner. (Cal. Government Code § 11517.)

17. Answering paragraph 23 of the complaint, the Department alleges that the administrative law judge issued a proposed decision dated March 11, 2002, and Insurance Commissioner Low adopted that proposed decision as the Decision o f the Department on March 21, 2002.

COUNT I

18. Answering paragraph 27 of the complaint, the Department incorporates by reference its answers to paragraphs 1 through 26 of the complaint as if those answers were fully set forth in this paragraph.

19. Answering paragraph 28 of the complaint, the Department admits that plaintiff 1Source appeared at the administrative hearing regarding the Order to Cease and Desist at issue, a copy of which is attached as Exhibit "A" to

the complaint. The Department further alleges that plaintiff 1Source presented evidence and arguments at the administrative hearing. Except as expressly admitted and alleged, the Department denies, generally and specifically, each and every remaining allegation contained in that paragraph.

20. The Department denies, generally and specifically, each and every allegation contained in paragraphs 29, 30, and 31 of the complaint.

COUNT II

21. Answering paragraph 32 of the complaint, the Department incorporates by reference its answers to paragraphs 1 through 31 of the complaint as if those answers were fully set forth in this paragraph.

22. The Department denies, generally and specifically, each and every allegation contained in paragraphs 33, 34, and 35 of the complaint.

AFFIRMATIVE DEFENSES

AS SEPARATE AND AFFIRMATIVE DEFENSES, the Department alleges as follows:

AFFIRMATIVE DEFENSE NO. 1. This court lacks subject matter jurisdiction over the matters alleged in the complaint on file in this action.

AFFIRMATIVE DEFENSE NO. 2. Plaintiffs have failed to state a claim upon which relief can be granted.

AFFIRMATIVE DEFENSE NO. 2. Defendants Harry Low and Jon A. Tomashoff, and each of them, at all relevant times mentioned in said complaint, acted in their official

capacities on behalf of the California Department of Insurance and not as individuals.

AFFIRMATIVE DEFENSE NO. 3. The matters alleged in the complaint involve predominantly the interpretation of California state law and this court should abstain from ruling upon these state law matters.

AFFIRMATIVE DEFENSE NO. 4. The Department properly exercised its authority under California state law, and in conformity with the Federal Risk Retention Act of 1986, in enforcing state licensing requirements pertaining to plaintiff 1Source. (15 U.S.C. § 3902(c), and Cal. Insurance Code § 116).

AFFIRMATIVE DEFENSE NO. 5. The Department properly exercised state authority delegated to the states under the Commerce Clause by the federal McCarran-Ferguson Act, 15 U.S.C. section 1011 *et seq.*, and the federal Risk Retention Act of 1986, 15 U.S.C. § 3902(f)(1).

AFFIRMATIVE DEFENSE NO. 6. The Department properly exercised its authority under California state law, and in conformity with the federal Risk Retention Act of 1986, in enforcing state financial responsibility requirements pertaining plaintiff 1Source. (15 U.S.C. §§ 3902(c) and 3905(d)(f)(1), Cal. Insurance Code § 116.)

AFFIRMATIVE DEFENSE NO. 7. The Department properly exercised its authority under California state law, and in conformity with the federal Risk Retention Act of 1986, in enforcing state financial responsibility requirements pertaining to plaintiff 1Source, which is financially unsound or otherwise dangerous to those who rely on its contractual insurance.

WHEREFORE, the Department prays for judgment as follows:

1. That the court dismiss the complaint on file in this action for lack of subject matter jurisdiction;

2. That the court dismiss the complaint on file in this action for failure to state a claim upon which relief can be granted;

3. That this court abstain from hearing the matters set for in plaintiffs complaint;

4. That plaintiffs' request for declaratory relief be denied;

5. That plaintiffs' request for a preliminary injunction and permanent injunction be denied;

6. That plaintiffs take nothing by reason of their complaint in this matter;

7. That the Department recover its costs of suit; and

8. That the Department receive such other and further relief as this court deems just and proper.

DATED: March 28, 2002

BILL LOCKYER, Attorney General
of the State of California

/s/

MARGUERITE C. STRICKLIN
Deputy Attorney General

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Attorneys for Plaintiffs
1Sourceautowarranty.com, Inc.,
d/b/a 1sourceautowarranty.com; and
PrimeGuard Insurance Company, Inc. (RRG)

[ENTERED: February 12, 2002]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PRIMEGUARD INSURANCE COMPANY, INC. (RRG), and 1SOURCEAUTOWARRANTY.COM, INC.

Plaintiffs,

v.

HARRY W. LOW, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, THE CALIFORNIA DEPARTMENT OF INSURANCE, and JON A. TOMASHOFF,

Defendants.

Case No.

COMPLAINT FOR DECLARATORY JUDGMENT

PrimeGuard Insurance Company, Inc. (RRG) ("PrimeGuard") and 1SourceAutoWarranty.com, Inc. ("1Source") complain of defendants as follows:

NATURE OF ACTION, JURISDICTION AND VENUE

1. This action arises under the United States Constitution and 15 U.S.C. § 3901, et seq., originally enacted as the Product Liability Risk Retention Act of 1981, and subsequently amended to the Federal Liability Risk Retention Act of 1986 ("Risk Retention Act").

2. By this action, plaintiffs seek a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202 ("Declaratory Judgment Act"), because there is an actual and justiciable controversy within the jurisdiction of this Court concerning the rights of the parties under the Risk Retention Act and 42 U.S.C. 1983 arising out of an *ex parte* cease and

desist order issued by defendant Harry W. Low, Insurance Commissioner of the State of California ("Commissioner") dated August 29, 2001, in the matter of 1SourceAutoWarranty.com, Inc., File No. VSC 080-AP. A copy of the August 29, 2001 order is attached as Exhibit "A".

3. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331 and 1337. This Court also has jurisdiction pursuant to 28 U.S.C. § 1332 on the basis that the matter in controversy exceeds the sum of $75,000, exclusive of interest and costs, and there exists complete diversity of citizenship between the plaintiffs and defendants.

4. Venue properly lies in this Court pursuant to 28 U.S.C. § 1391(b) and in that a substantial part of the events or omissions giving rise to the claims stated herein occurred in this judicial district.

THE PARTIES

5. Plaintiff PrimeGuard is a risk retention insurance company domiciled in the State of Hawaii with its principal place of business in Hawaii and duly authorized to do business by the Hawaii Division of Insurance. PrimeGuard is also duly registered as a risk retention group in the State of California in accordance with the California Risk Retention Act of 1991.

6. Plaintiff 1Source is a member of PrimeGuard, is a Colorado corporation with its principal place of business in Colorado and is authorized to do business in California.

7. Defendant Department of Insurance of the State of California is a duly established state administrative agency exercising administrative and executive powers in the State of California.

8. Defendant Harry W. Low is the Insurance Commissioner of the California Department of Insurance and has acted under color of state law with the intent and purpose of unlawfully discriminating against Plaintiffs.

9. Defendant Jon A. Tomashoff is the Senior Staff Counsel of Defendant Department of Insurance and has acted under color of state law with the intent and purpose of unlawfully discriminating against Plaintiffs.

FACTS

10. PrimeGuard is an RRG formed pursuant to the Federal Product Liability Risk Retention Act of 1981, 15 U.S.C. § 3901, *et seq.*, amended in 1986 by the Federal Liability Risk Retention Act of 1986 ("Risk Retention Act," "RRA" or "Act").

11. PrimeGuard commenced doing business as a duly licensed insurance company under the laws of the State of Hawaii on April 6, 1998.

12. Hawaii is the domiciliary state for PrimeGuard under the Risk Retention Act.

13. PrimeGuard filed for registration in California as a risk retention group in March of 1999.

14. In its business, PrimeGuard insures vehicle service agreements ("VSAs") issued to its members in most states and the District of Columbia.. These vehicle service agreements protect automobile owners who purchase VSA's by paying for repairs to automobiles covered by the terms of such agreements. These VSA's are administered by PrimeGuard's members. The risk retention group members are the named insureds under PrimeGuard policies, and the automobile owners are the beneficiaries of this insurance if

for any reason an RRG group member such as 1Source fails to perform its obligations.

15. Plaintiff 1Source is what is commonly referred to in the service contract business as an "administrator-obligor". In this role, 1Source also provides insurance related services, management, administration, and underwriting for PrimeGuard. Under the 1Source VSA, PrimeGuard insures 1Source's contractual obligations against claims brought by automobile owners if 1Source fails to pay for covered repairs. 1Source is the insured party under the VSA and the individual automobile owners are the third party beneficiaries of PrimeGuard's policy with 1Source. 1Source's VSA specifically informs consumers that the VSA is not an insurance policy:

> You are reminded that your VSA is not an insurance policy. However, it is an insured service contract. In the event that the Administrator fails to authorize covered repairs or authorized repair claims within sixty (60) days after all proper proof of loss documents have been filed it, You are entitled to make a direct claim against PrimeGuard.

16. 1Source is one of PrimeGuard's most active group members, accounting for approximately 70% of PrimeGuard's business.

17. On or about August 29, 2001, Defendants Low and California Department of Insurance ("CDOI"), without notice or an opportunity to be heard as to either 1Source or PrimeGuard, created a document entitled "Order to Cease and Desist" ("C&D Order") (Exhibit A) and sent it to 1Source. CDOI did not request that the C&D Order be issued by an independent judicial officer acting through a

court of competent jurisdiction as required by the RRA under 15 U.S.C. § 3902(a)(1)(G).

18. Although the order was directed to 1Source, it directly impacted and regulated the operations of PrimeGuard by prohibiting its member, 1Source, from doing business in California.

19. On September 10, 2001, 1Source requested a hearing on the validity of the C&D order under the Federal Risk Retention Act. Rather than set the matter for an immediate hearing, on its *ex parte* order the CDOI instead set the matter for a hearing on December 10, 2001, over a hundred days after the issuance of the C&D Order. 1Source was informed that the December 10, 2001 date was the earliest hearing date available. 1Source was not responsible for the delay in the hearing date although it has been irreparably prejudiced by the delay.

20. Upon receipt of the C&D Order, 1Source attempted to cooperate with the CDOI and comply with the terms of the Order by conforming to the requirements of California Insurance Code §116(d), even though 1Source believed that it was exempt from the statute and order under the RRA. 1Source has gone to considerable lengths to satisfy the requirements of California Insurance Code §116(d) to be a good corporate citizen. 1Source has communicated its compliance to the CDOI but the CDOI has refused and continues to refuse to dissolve the C&D Order.

21. On December 10, 2001, a hearing was held on the C&D Order before an administrative law judge working for the CDOI. At the hearing, the CDOI called as its chief witness its own senior staff attorney, Defendant Tomashoff, who testified that the CDOI has a "special project" where it pursues only out-of-state companies doing business over the internet for compliance of California Insurance Code

§116(d). Mr. Tomashoff further testified that there were three employees who worked on this project. At the same time, Mr. Tomashoff testified that the CDOI does not investigate California automobile dealers for compliance with §116(d) and it has no investigators assigned to investigate California automobile dealers for compliance with §116(d). In summary, Mr. Tomashoff testified that §116(d) was only enforced against out-of-state companies.

22. Under California law, the administrative law judge working for CDOI does not decide on the matters before him but instead issues a "recommendation" which may or may not be accepted by Defendant Low.

23. As of the date and time of this Complaint the Administrative Law Judge has failed to issue any recommendation as to the C&D Order directed to 1Source.

24. Upon information and belief, In January 2002, Defendant Tomashoff began to contact 1Source's nationwide business associates and advertisers via e-mail and telephone. Defendant Tomashoff threatened 1Source's associates and advertisers that if they continued to carry internet "links" on their websites to the 1Source website, Defendant Low would commence an enforcement action against them for "aiding and abetting" violations of California law. An example of one of Defendant Tomashoff s e-mails is attached hereto as Exhibit B.

IRREPARABLE HARM

25. The *ex parte* C&D Order has caused irreparable harm to PrimeGuard and its group members, including 1Source, during the Defendant's five month delay in ruling upon the validity of the C&D Order. More importantly, this irreparable harm will continue each day that the Defendants delay in ruling upon the C&D Order.

26. 1Source will suffer further irreparable harm in that it is under contractual obligations to provide vehicle service agreements and will be unable to fulfill those contractual obligations so long as the C&D Order is in effect. This will likely force companies to leave the 1Source and PrimeGuard Programs for some other source, leaving 1Source and PrimeGuard in a position where they may never be able to recover their market position or even to continue their operations. Plaintiffs' are also harmed by Defendant Tomashoff's conduct in contacting 1Source's advertisers and intentionally interfering with 1Source's business relationships.

COUNT I
DECLARATORY JUDGMENT
CASE AND CONTROVERSY

27. Plaintiffs incorporate, as if fully set forth herein, the allegations contained in paragraph 1 through 29 above.

28. Before the CDOI and the CDOI's administrative law judge, 1Source and PrimeGuard contended that under the Risk Retention Act, 15 U.S.C. §§ 3902(a)(1)(h) and 3902(e)(2), Defendant Low and Defendant CDOI could not enter an *ex parte* C&D order unless they petitioned a "federal or state court of competent jurisdiction" for such relief. (emphasis added). Under the Risk Retention Act only a court of competent jurisdiction independent of the CDOI can issue an injunction against a risk retention group and its members. Here, Defendants Low and the CDOI themselves issued the *ex parte* C&D Order.

29. The C&D Order was issued on grounds which directly conflict with or are in violation of the Risk Retention Act, particularly 15 U.S.C. §§ 3902(a) and (b). The C&D Order is a violation of federal law which expressly

preempts the field and prohibits a non-domiciliary state - subject to narrow exemptions - from regulating or attempting to regulate, directly or indirectly, a risk retention group or their members.

30. The Risk Retention Act sets out minimum procedures that non-domiciliary states, such as California in this case, must follow in order to obtain injunctive relief against a risk retention group or its members. These procedures insure that risk retention groups and their members are afforded the due process rights that would exist if the CDOI brought the matter before a court of competent jurisdiction, such as the right to an impartial decision maker. Further, a court would have applied the legal standards for issuing an injunction, including the balancing of the harm and the likelihood of succeeding on the merits. The CDOI instead issued an indefinite, *ex parte* Temporary Restraining Order without making the findings that would be required if the CDOI petitioned an independent state or federal court as required by the Risk Retention Act. Defendants' actions have deprived 1Source and PrimeGuard of their due process rights intended by the Risk Retention Act.

31. An issue in controversy exits between Plaintiffs and Defendants as to whether the C&D Order, violates the Risk Retention Act and violates the Commerce Clause and plaintiffs' rights to due process, equal protection and privileges and immunities under the United States Constitution. This dispute requires the resolution of important questions of federal statutory and constitutional law. Plaintiffs are entitled to declaratory relief.

COUNT II
VIOLATION OF DUE PROCESS UNDER
COLOR OF STATE LAW

32. Plaintiffs incorporate, as if fully set forth herein, the allegations contained in paragraphs 1 through 31, inclusive, above.

33. Defendants' actions as set forth above constitute actions taken under color of state law with the intent and purpose of unlawfully discriminating against Plaintiffs thereby denying their rights to due process, equal protection and privileges and immunities under the United States Constitution and the Risk Retention Act

34. Defendants willfully disregard of the constitutional rights of Plaintiffs and their rights under the Risk Retention Act.

35. Defendants knew or should have known that their conduct would have the effect of denying Plaintiffs their right to due process, equal protection and privileges and immunities under the United States Constitution and the Risk Retention Act.

WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

(a) A declaratory judgment that the Defendants Low and the CDOI, not being a court of competent jurisdiction under the Risk Retention Act, did not have jurisdiction to issue the C&D Order;

(b) A declaratory judgment that the C&D Order is in violation of the rights granted Plaintiffs under the Risk Retention Act;

(c) A declaratory judgment that the C&D Order is a violates Plaintiffs' due process and equal protection rights under the United States Constitution;

(d) A declaratory judgment rescinding and declaring void the C&D Order as an unlawful regulation of a Risk Retention Group and its members;

(e) The issuance of a preliminary and permanent injunction enjoining Defendants from enforcing the C&D Order;

(f) An award to Plaintiffs of their costs of this action, including reasonable attorneys' fees as permitted by law; and

(g) Such further relief as the Court may deem just and appropriate.

COHEN GETTINGS, P.C.
FLEMING & PHILLIPS LLP

By:_____
JAMES H. FLEMING

Attorneys for Plaintiffs
1Sourceautowarranty.com, Inc.,
d/b/a 1sourceautowarranty.com; and
PrimeGuard Insurance Company, Inc. (RRG)

EXHIBIT A

BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA

In the Matter of 1SOURCEAUTOWARRANTY.COM, INC. d.b.a. 1SOURCEAUTOWARRANTY.COM Respondent	ORDER TO CEASE AND DESIST and NOTICE OF RIGHT TO HEARING (Ins. Code § 12921.8) File No. VSC OSO-AP

ORDER TO CEASE AND DESIST

TO: 1SOURCEAUTOWARRANTY.COM, INC. d.b.a. 1SOURCEAUTOWARRANTY.COM:

YOU ARE HEREBY ORDERED IMMEDIATELY TO CEASE AND DESIST FROM DIRECTLY MARKETING AUTOMOBILE SERVICE CONTRACTS TO CALIFORNIA CONSUMERS BY THE INTERNET, TELEPHONE, MAIL, ADVERTISING, OR ANY OTHER MEANS.
WHEREAS:

1. Respondent 1Sourceautowarranty.com. Inc. (hereafter "1Sourceautowarranty") acts as a "third party obligor" of automobile service contracts. 1Sourceautowarranty is not licensed as an insurance agent or broker and is not an automobile deafer. 1Sourceautowarranty sells automobile service contracts

directly to California-consumers over the Internet. Further, 1Sourceautowarranty is acting as an insurance company, without a certificate of authority to do so, by selling third party obligar automobile service contracts without complying with California Insurance Code ("CIC") § 116(d). Therefore, 1Sourceautowarranty is in violation of CIC § 700(a) and (b).

2. Pursuant to CIC § 116, automobile service contracts issued by a third party obligor constitutes automobile insurance, unless the obligor of those contracts compiles with the requirements of CIC § 116(d).

3. Pursuant to CIC § 116(d), automobile service contracts can only be sold by an automobile dealer incidental to the automobile dealer's business of selling or leasing automobiles.

4. Pursuant to CIC § 116(a) doing or proposing to do any business in substance equivalent to the business described in CIC § 116 in a manner designed to evade the provisions of this section is the doing of an insurance business.

5. Pursuant to CIC § 702 and 1726(b) transacting Insurance is defined as providing a quote, accepting an application for coverage, or otherwise communicating regarding one or more terms of an agreement to provide insurance or an insurance policy with a California resident.

6. CIC § 12921.8(a) authorizes the Insurance Commissioner to issue a cease and desist order against any person transacting the business of insurance without having been issued a certificate of authority.

7. CIC § 12921.8(a) authorizes the Insurance Commissioner to Issue a cease and desist order without holding a hearing prior to issuance of the order.

PLEASE TAKE NOTICE that pursuant to CIC § 12921.8(a), the Insurance Commissioner may impose a fine of up to five thousand dollars ($5,000) for each day this order is violated.

NOTICE OF RIGHT TO HEARING

CIC § 12921.8(b) provides in part as follows: "A person to whom a cease and desist order is issued, may, within seven days after service of the order, request a hearing by filing a request for a hearing with the commissioner." Your written request for a hearing must be directed to: Kathleen L. Morgan, Staff Counsel, California Department of Insurance, 45 Fremont Street, 21st Floor, San Francisco, California 94105.

IN WITNESS WHEREOF, I have set my hand and affixed my official seal this 29th day of August, 2001.

HARRY W. LOW
Insurance Commissioner

By: /s/
PATRICIA K. STAGGS
Assistant Chief Counsel

EXHIBIT B

eBay, Inc.
145 Hamilton Ave.
San Jose, CA 95125

Dear Mr. Lanciault:

As we discussed on the telephone this morning, the California Department of Insurance learned yesterday that eBay is providing a link to 1Source Auto Warranty, from which California residents may purchase automobile extended service contracts.

Third party obligor service contracts offered to California residents must comply with California Insurance Code section 116(d). Among the requirements of that section: The obligor must possess a California fire and casualty broker-agent license (116(d)(2)), and have posted a security deposit with the Insurance Commissioner (116(D)(3)(A)(2). 1Source has not complied with either of these requirements.

In addition, 116(d) states that service contracts may only be sold "...by an automobile dealer incidental to the automobile dealer's business of selling or leasing automobiles..." Based on this language, warranty companies may not sell service contracts directly to consumers over the internet.

Because 1Source has apparently violated Insurance Code section 116(d), on or about August 29, 2001, the California Department of Insurance issued and served 1Source with an immediate cease and desist order. A copy of that order can be found by searching for 1Source at http://www.insurance.ca.gov/docs/FS-EAPleading.htm. By providing a link to 1Source, eBay could be found to be aiding and abetting the (alleged) illegal transaction of

insurance in this State by 1Source, and thus be subject to an enforcement action by the Insurance Commissioner.

1Source requested and received a hearing before an administrative law judge on the propriety of the Department's cease and desist order. A proposed decision is expected shortly, in the only other such case brought by the Department for which a proposed decision has been obtained, the ALJ upheld the Department's cease and desist order. The Department expects a similar result in the case of 1Source. In the meantime, the order is in effect, but apparently has not been complied with.

1Source has not yet exhausted its administrative and other legal remedies with regard to the Department's cease and desist order. 1Source has raised several defenses to the Departments action. eBay should evaluate those defenses and make its own conclusion before taking any action that affects its relationship with 1Source.

You are welcome to phone or e-mail me with any questions.

Sincerely,

Jon A. Tomashoff, CPCU, Senior Staff Counsel
California Department of Insurance, Legal Division
45 Fremont Street, 21st Floor
San Francisco, CA 94105
TEL: 415 538-4119
FAX: 415-904-5490
E-Mail: tomashoffj@insurance.ca.gov

U.S. District Court
California Northern District (San Francisco)
CIVIL DOCKET FOR CASE #: 3:02-cv-00748
(As of 05/18/05)

PrimeGuard Insurance Company, Inc. et al v. Low et al
Assigned to: Hon. Jeffrey S. White
Cause: 28:2201 Declaratory Judgement

Date Filed: 02/12/2002
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

Plaintiff

PrimeGuard Insurance Company, Inc.

represented by

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Email: jhfleming@reedsmith.com
TERMINATED: 03/27/2002
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ATTORNEY TO BE NOTICED

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ATTORNEY TO BE NOTICED

Plaintiff

1SourceAutoWarranty.com

represented by

James Howard Fleming
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Paul Wilfred Windust
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LEAD ATTORNEY
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V.

Defendant

Harry W. Low
Insurance Commissioner of the State of California

represented by

Marguerite C. Stricklin
Attorney General's Office
1515 Clay Street 20th Floor
Oakland, CA 94612
510 622-2146
Email: marguerite.stricklin@doj.ca.gov
ATTORNEY TO BE NOTICED

Defendant

California Department of Insurance

represented by

Marguerite C. Stricklin
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Jon A. Tomashoff

represented by

Marguerite C. Stricklin
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
2/12/2002	1	COMPLAINT */noprocess* against California Department of Insurance, Harry W. Low, Jon A. Tomashoff (Filing fee $150 receipt number 4405314). Filed by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (ga,) Additional attachment(s) added on 3/19/2002 (be,). (Entered: 02/15/2002)
2/12/2002	2	ADR SCHEDULING ORDER: Case Management Statement due by 6/12/2002. Case Management Conference set for 6/19/2002 at 10:30 AM.. Signed by Judge James Larson on 2/12/02. (ga,) (Entered: 02/15/2002)
2/14/2002	3	Declination to Proceed Before a U.S. Magistrate Judge by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc.. (ga,) (Entered: 02/19/2002)
2/20/2002		Summons Issued as to California Department of Insurance; Harry W. Low; Jon A. Tomashoff (ga,) (Entered: 02/20/2002)

2/20/2002	4	MOTION for Preliminary Injunction filed by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc.. (ga,) Additional attachment(s) added on 3/19/2002 (be,). (Entered: 02/25/2002)
2/20/2002	5	DECLARATION in Support re 4 filed by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc.. (Related document(s)4) (ga,) Additional attachment(s) added on 3/19/2002 (be,). (Entered: 02/25/2002)
2/20/2002	6	DECLARATION in Support re 4 filed by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc.. (Related document(s)4) (ga,) Additional attachment(s) added on 3/19/2002 (be,). (Entered: 02/25/2002)
2/25/2002	7	Clerk's Notice of Impending Reassignment (ga,) (Entered: 02/25/2002)
2/26/2002	8	ORDER REASSIGNING CASE. Case reassigned to Judge Vaughn R. Walker and Vaughn R. Walker for all further proceedings. Judge James Larson no longer assigned to case. Signed by Executive Committee on 2/26/02. (ga,) (Entered: 03/05/2002)
3/5/2002		CASE DESIGNATED for Electronic Filing. Mailed packet to parties; (ga,) (Entered: 03/05/2002)
3/8/2002	9	MOTION for Pro Hac Vice *for attorney John C. Pasierb* filed by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc.. (ga,) (Entered: 03/14/2002)

3/15/2002	11	ORDER by Judge Vaughn R. Walker granting [9]John C. Pasierb's Motion for Pro Hac Vice (be,) (Entered: 03/20/2002)
3/18/2002	10	MOTION for Preliminary Injunction *(Notice)* filed by PrimeGuard Insurance Company, Inc., 1SourceAutoWarranty.com. Motion Hearing set for 5/9/2002 02:00 PM. (Fleming, James) (Entered: 03/18/2002)
3/23/2002	12	CLERK'S NOTICE : Motion for Preliminary Injunction scheduled for 5/9/2002 at 2:00 PM. Initial Case Management Conference set for 5/9/2002 at 03:30 PM. (cgd,) (Entered: 03/23/2002)
3/25/2002	13	STIPULATION *To Extend Time To File Response* by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (Attachments: # 1 # 2)(Stricklin, Marguerite) (Entered: 03/25/2002)
3/27/2002	14	MOTION to Substitute Attorney filed by PrimeGuard Insurance Company, Inc.. (Barber, Stephan) (Entered: 03/27/2002)
3/28/2002	15	ANSWER to Complaint by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (Stricklin, Marguerite) (Entered: 03/28/2002)
3/29/2002	16	Mail Returned *addressed to John Pasierb re clerk's notice.* (be,) (Entered: 04/03/2002)

4/18/2002	17	Memorandum in Opposition re 10 *Motion for Preliminary Injunction* filed by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (Attachments: # 1)(Stricklin, Marguerite) (Entered: 04/18/2002)
4/18/2002	18	DECLARATION in Opposition *to Motion for Preliminary Injunction* filed by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (Attachments: # 1 Exhibit # 2 Exhibit # 3 Exhibit # 4 Exhibit # 5 Exhibit # 6 Exhibit # 7 Exhibit)(Stricklin, Marguerite) (Entered: 04/18/2002)
4/25/2002	19	Request for Judicial Notice *Re Opposition to Motion for Preliminary Injunction* filed by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (Attachments: # 1 Exhibit Copies of Web pages) (Stricklin, Marguerite) (Entered: 04/25/2002)
4/25/2002	20	Request for Judicial Notice re 19 *Notice of Manual Filing of Exhibit* 2 filed by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (Related document(s)19) (Stricklin, Marguerite) (Entered: 04/25/2002)
4/25/2002	21	Reply Memorandum to Motion re 10 filed by 1SourceAutoWarranty.com. (Attachments: #1 Exhibit 1981 House Report# 2 Exhibit Transcript)(Pasierb, John) (Entered: 04/25/2002)
4/26/2002	24	NOTICE *regarding Exhibit Attachment* by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (be,) (Entered:05/02/2002)

4/26/2002	25	Request for Judicial Notice filed by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (be,) (Entered: 05/02/2002)
5/1/2002	22	Reply Memorandum to Motion re 10 *and 19 Request for Judicial Notice* filed by 1SourceAutoWarranty.com. (Attachments: # 1 Exhibit Webpage, autobytel.com)(Pasierb, John) (Entered: 05/01/2002)
5/2/2002	23	JOINT CASE MANAGEMENT STATEMENT filed by 1SourceAutoWarranty.com. (Pasierb, John) (Entered: 05/02/2002)
5/10/2002	26	Minute Entry: Motion Hearing re Plaintiffs' Motion for Preliminary Injunction104held/Submitted on 5/9/2002 before Vaughn R. Walker. Initial Case Management Conference held on 5/9/2002 before Vaughn R. Walker, order to be prepared by court(Court Reporter Kathy Wyatt.) (cgd,) (Entered: 05/10/2002)
5/10/2002	27	CASE MANAGEMENT SCHEDULING ORDER: Defendant's Motion to Dismiss or Motion for Summary Judgment is scheduled for 6/27/2002 at 2:00 PM. Discovery Cut-Off: 8/29/2002. Dispositive Motions Hearing set for 9/19/2002 02:00 PM. Pretrial Conference set for 10/10/2002 03:30 PM.. Signed by Judge Vaughn R. Walker on 5/10/2002. (cgd,) (Entered: 05/10/2002)
5/16/2002	29	TRANSCRIPT for dates 05/09/02 by Katherine Wyatt. (be,) (Entered: 05/22/2002)

5/20/2002	28	MOTION to Amend/Correct *Complaint* filed by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc.. Motion Hearing set for 6/27/2002 02:00 PM. (Attachments: # 1 Exhibit Proposed Amended Complaint# 2 Proposed Order)(Pasierb, John) (Entered: 05/20/2002)
5/23/2002	30	NOTICE *of Rule 26(a) Disclosures* by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc.. (Pasierb, John) (Entered: 05/23/2002)
5/23/2002	31	MOTION for Judgment on the Pleadings filed by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. Motion Hearing set for 6/27/2002 02:00 PM. (Attachments: # 1 # 2 # 3 # 4 Exhibit # 5 # 6 # 7 # 8 # 9 # 10 # 11)(Stricklin, Marguerite) (Entered: 05/23/2002)
6/6/2002	32	Memorandum in Opposition re *28 Motion to Amend/Correct Complaint* filed by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (Stricklin, Marguerite) (Entered: 06/06/2002)

6/6/2002	33	Memorandum in Opposition re 31 filed by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc.. (Attachments: # 1 Affidavit Pasierb Declaration# 2 Exhibit Exhibit 1, C&D Order# 3 Errata Exhiibit 2, Tomashoff e-mail# 4 Exhibit Exhibit 3, 6/20/01 CDOI Letter# 5 Exhibit Exhibit 4, RRA Article# 6 Exhibit Exhibit 5, 12/13/01 CDOI letter# 7 Exhibit Exhibit 6, 5/28/02 CDOI Letter# 8 Exhibit Exhibit 7, CDOI C&D Order-Warranty Gold# 9 Exhibit Exhibit 8, House report# 10 Exhibit Exhibit 9, 5/6/02 CDOI Letter)(Pasierb, John) (Entered: 06/06/2002)
6/13/2002	34	STATEMENT OF RECENT DECISION pursuant to Civil Local Rule 7-3.d re 31 filed by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc.. (Pasierb, John) (Entered: 06/13/2002)
6/13/2002	35	Reply Memorandum to Motion re 31 *In Support of Motion for Judgment on the Pleadings* filed by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (Attachments: # 1 Affidavit Declaration of Kathleen Morgan)(Stricklin, Marguerite) (Entered: 06/13/2002)

6/20/2002	36	MOTION FOR PARTIAL SUMMARY JUDGMENT as to filed by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc.. Motion Hearing set for 7/25/2002 10:00 AM. (Attachments: # 1 Affidavit Declaration# 2 Exhibit C&D Order# 3 Exhibit E-Mail# 4 Exhibit CDOI Letter)(Pasierb, John) (Entered: 06/20/2002)
6/25/2002	37	ORDER re 28, 31. Signed by Judge Walker on 6/25/02. (vrwlc2,) (Entered: 06/25/2002)
7/25/2002	38	Memorandum in Opposition re 36 *Pls. Motion for Partial Summ. Judg't & in Support of Defendant's Motion for Summ. Judg't* filed by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (Stricklin, Marguerite) (Entered: 07/25/2002)
7/25/2002	39	EXHIBITS re 38 *A, B, andC* filed by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (Related document(s)38) (Stricklin, Marguerite) (Entered: 07/25/2002)
8/1/2002	40	Reply Memorandum to Motion re 36 *Partial Summary Judgment* filed by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc.. (Attachments: # 1 Exhibit Declaration)(Pasierb, John) (Entered: 08/01/2002)

8/16/2002	41	Minute Entry: Motion Hearing re 36, 28, 31held/SUBMITTED on 8/15/2002 before Judge Vaughn R. Walker ; order to be prepared by court. (Court Reporter James Yeomans.) (cgd,) (Entered: 08/16/2002)
8/19/2002	42	ORDER by Judge Walker granting 31 Motion for Judgment on the Pleadings, denying 36 Motion for Partial Summary Judgment, terminating 10 Motion for Preliminary Injunction, terminating 28 Motion to Amend/Correct (vrwlc2,) (Entered: 08/19/2002)
9/18/2002	43	AMENDED COMPLAINT against all defendants. Filed by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc.. (Attachments: # 1 Exhibit C&D Order# 2 Exhibit E-Mail)(Pasierb, John) (Entered: 09/18/2002)
10/8/2002	44	STIPULATION re 43 *Extension of Time to Respond to Amended Complaint by* California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (Stricklin, Marguerite) (Entered: 10/08/2002)
10/10/2002	45	or in the alternative MOTION to Dismiss *Amended Complaint or, in the alternative, for Summary Judgment* filed by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. Motion Hearing set for 1/23/2003 02:00 PM. (Stricklin, Marguerite) (Entered: 10/10/2002)

11/14/2002	46	MOTION for Certificate of Appealability filed by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc.. Motion Hearing set for 1/23/2003 02:00 PM. (Pasierb, John) (Entered: 11/14/2002)
1/2/2003	47	Memorandum in Opposition re 45 filed by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc.. (Attachments: # 1 Affidavit of John Pasierb# 2 Exhibit Exhibit 1# 3 Exhibit Exhibit 2# 4 Exhibit Exhibit 3# 5 Exhibit Exhibit 4# 6 Exhibit Exhibit 5# 7 Exhibit Exhibit 6# 8 Exhibit Exhibit 7# 9 Exhibit Exhibit 8)(Pasierb, John) (Entered: 01/02/2003)
1/2/2003	48	Memorandum in Opposition re 46 *Request for Cert. per sec 1292(b)* filed by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (Stricklin, Marguerite) (Entered: 01/02/2003)
1/2/2003	49	Memorandum in Opposition re 46 *Request for Cert.* filed by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (Stricklin, Marguerite) (Entered: 01/02/2003)
1/9/2003	50	Reply Memorandum to Motion re 46 *Certification* filed by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc.. (Pasierb, John) (Entered: 01/09/2003)

1/9/2003	51	Reply Memorandum to Motion re 45 *In support of Motion to Dismiss or, in the alternative, for summary judgment* filed by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (Attachments: # 1 Affidavit # 2 Exhibit Exhibits A, B, and C# 3 Affidavit # 4 Exhibit Exhibit D# 5 Exhibit Exhibit E)(Stricklin, Marguerite) (Entered: 01/09/2003)
1/14/2003	52	Request for Judicial Notice re 45 filed by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (Attachments: # 1 Exhibit D# 2 Exhibit E# 3 Exhibit F# 4 Exhibit G# 5 Exhibit H)(Related document(s)45) (Stricklin, Marguerite) (Entered: 01/14/2003)
1/14/2003	53	NOTICE re 45 *Manual Filing of Exhibit I to Request for Judicial Notice* by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (Stricklin, Marguerite) (Entered: 01/14/2003)
1/14/2003	54	ORDER REASSIGNING CASE. Case reassigned to Judge Jeffrey S. White for all further proceedings. Judge Vaughn R. Walker no longer assigned to case. Signed by Judge Richard Wieking on 1/14/03. (hdj,) (Entered: 01/15/2003)
1/21/2003	55	NOTICE *of Manual Filing* by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (ci,) (Entered: 01/24/2003)

5/15/2003	56	NOTICE re 45 *Amended Notice of Motion to Dismiss Amended Complaint or, in the Alternative, for Summary Judgment* by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. (Stricklin, Marguerite) (Entered: 05/15/2003)
5/15/2003		Set/Reset Deadlines as to Motion 45. Motion Hearing set for 8/1/2003 09:00 AM. (vlh,) (Entered: 05/16/2003)
6/16/2003	57	Re-Notice Motion Hearing re 45 *MOTION to Dismiss for Lack of Jurisdiction, or in the alternative MOTION for Summary Judgment [Corrected Amended Notice of Hearing]* filed by California Department of Insurance, Harry W. Low, Jon A. Tomashoff. Motion Hearing set for 8/1/2003 09:00 AM. (Stricklin, Marguerite) Modified on 6/17/2003 (vlh,). (Entered: 06/16/2003)
6/27/2003	58	Renotice motion hearing *Request for Certification* filed by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc.. Motion Hearing set for 8/1/2003 09:00 AM. (Pasierb, John) (Entered: 06/27/2003)
8/1/2003	59	Minute Entry: Motion Hearing held on 8/1/2003 before Judge Jeffrey S. White. (Court Reporter Kathy Wyatt.) (jjo,) (Entered: 08/01/2003)

9/2/2003	60	ORDER by Judge Jeffrey S. White GRANTING 46 Motion for Certificate of Appealability; STAYING proceedings in this action pending the Ninth Circuit's consideration of the appeal. (jswlc1,) (Entered: 09/02/2003)
9/16/2003	61	NOTICE re 60 by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc.. (Pasierb, John) (Entered: 09/16/2003)
11/26/2003	62	NOTICE OF APPEAL by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc.. Filing fee $ 255, receipt number 3353922. Appeal Record due by 12/26/2003. (vlh, COURT STAFF) (Filed on 11/26/2003) (Entered: 12/01/2003)
12/1/2003	63	Copy of receipt for appeal and USCA order sent to the USCA (vlh, COURT STAFF) (Filed on 12/1/2003) (Entered: 12/01/2003)
12/2/2003		USCA Scheduling Order as to [62] Notice of Appeal. USCA Case Number: 03-17196 (vlh, COURT STAFF) (Filed on 12/2/2003) (Entered: 12/04/2003)
12/9/2003	64	TRANSCRIPT of Proceedings held on 8/15/02 before Judge Vaughn R. Walker. Court Reporter: James Yeomans. (hdj, COURT STAFF) (Filed on 12/9/2003) (Entered: 12/15/2003)

12/11/2003	65	TRANSCRIPT DESIGNATION by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc. for proceedings held on 5/9/2002; 8/15/2002; 8/01/2003. (vlh, COURT STAFF) (Filed on 12/11/2003) (Entered: 12/15/2003)
1/8/2004	66	TRANSCRIPT of Proceedings held on 8/01/2004 before Judge Jeffrey S. White. Court Reporter: Katherine Wyatt.. (vlh, COURT STAFF) (Filed on 1/8/2004) (Entered: 01/09/2004)
5/10/2004	67	NOTICE by PrimeGuard Insurance Company, Inc. *Notice of Pendency of Other Action or Proceeding* (Barber, Stephan) (Filed on 5/10/2004) (Entered: 05/10/2004)
5/10/2004	69	NOTICE of Related Case by 1SourceAutoWarranty.com, PrimeGuard Insurance Company, Inc. (vlk, COURT STAFF) (Filed on 5/10/2004) (Entered: 05/17/2004)
5/11/2004	68	Certificate of Record Mailed to USCA re appeal [62] (vlk, COURT STAFF) (Filed on 5/11/2004) (Entered: 05/11/2004)
2/11/2005	70	USCA JUDGMENT: On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED. (hdj, COURT STAFF) (Filed on 2/11/2005) (Entered: 02/14/2005)

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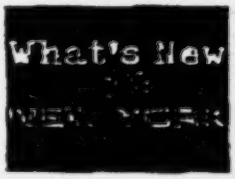

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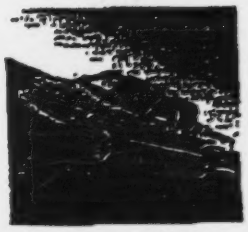

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Vehicle Information

Vehicle Year: 2000
Vehicle Make: CHEVROLET
Base Model: CAVALIER
Options: ☐ 4WD/AWD ☐ Turbo/Supercharger ☐ Diesel
We're sorry, but at this time we do not cover Twin-Turbo's
Odometer Reading: 9600 (max. 138000 miles)

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Country: United States
State/Province: -- Select a State --
Not available in California.
First Name: j
Last Name: reyes
Day Phone: (714) 541-1754
Evening Phone: (714) 541-1754
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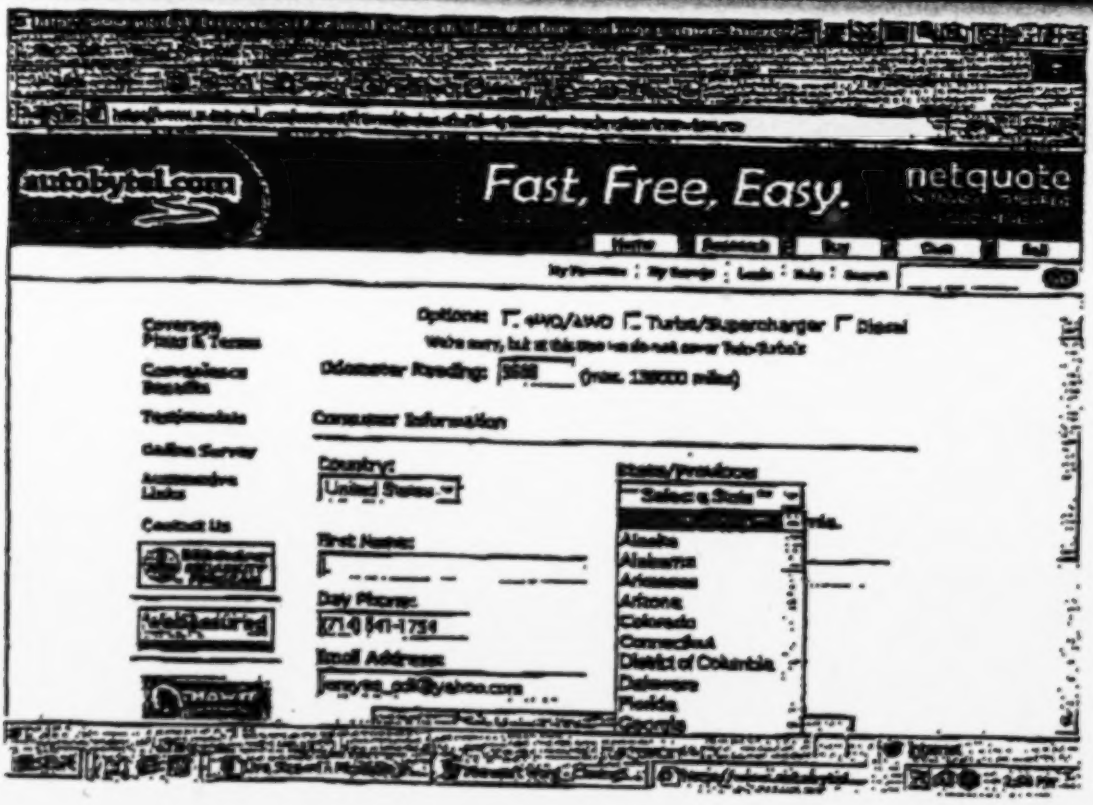
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